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# Supreme Court of the United States

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
*Petitioner,*

v.

ALBUQUERQUE COMMONS PARTNERSHIP,
*Respondent.*

**On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) When a local government seeks to rezone property, does ordinary legislative process violate the Due Process Clause of the 14th Amendment, and must the local government instead provide a quasi-judicial hearing, in which "*ex parte* communications" between legislators and constituents are prohibited?

(2) May the owner of rezoned property assert a procedural due process claim for damages under 42 U.S.C. § 1983 without pursuing the remedies available under state law?

## PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| I. FACTUAL BACKGROUND | 3 |
| II. PROCEEDINGS BELOW | 5 |
| REASONS FOR GRANTING THE PETITION | 10 |
| I. THE STATE COURT'S DECISION THAT USING A LEGISLATIVE PROCESS TO EFFECT A ZONING CHANGE VIOLATES DUE PROCESS DEEPENS A SPLIT AMONG STATE AND FEDERAL COURTS | 11 |
| II. THE DECISION THAT A PROPERTY OWNER NEED NOT PURSUE STATE LAW REMEDIES BEFORE PROCEEDING UNDER SECTION 1983 CONFLICTS WITH A DECISION OF THIS COURT AND DEEPENS A CONFLICT AMONG THE LOWER COURTS | 19 |
| CONCLUSION | 24 |

APPENDIX

APPENDIX A: *Albuquerque Commons P'ship* v. *City Council*, 212 P.3d 1122 (N.M. Ct. App. 2009) ..... 1a

APPENDIX B: *Albuquerque Commons P'ship* v. *City Council*, 184 P.3d 411 (N.M. 2008) ..... 45a

APPENDIX C: *Albuquerque Commons P'ship* v. *City Council*, 149 P.3d 67 (N.M. Ct. App. 2006) ..... 82a

APPENDIX D: *Albuquerque Commons P'ship* v. *City Council*, CV-95-06031 (Dist. Ct. Bernalillo County, N.M. July 23, 1999) ..... 140a

APPENDIX E: *Albuquerque Commons P'ship* v. *City Council*, CV-95-06031 (Dist. Ct. Bernalillo County, N.M. June 17, 1998) ..... 146a

APPENDIX F: *Albuquerque Commons P'ship* v. *City Council*, No. 31,725 (N.M. June 22, 2009) ..... 153a

TABLE OF AUTHORITIES

CASES Page

*Arnel Dev. Co.* v. *City of Costa Mesa*, 28 Cal. 3d 511 (1980) ..... 16
*Bigelow* v. *Michigan Dep't of Natural Res.*, 970 F.2d 154 (6th Cir. 1992) ..... 22
*City of Eastlake* v. *Forest City Enters., Inc.*, 426 U.S. 668 (1976) ..... 17
*Cloutier* v. *Town of Epping*, 714 F.2d 1184 (1st Cir. 1983) ..... 16
*Cormack* v. *Settle-Beshears*, 474 F.3d 528 (8th Cir. 2007) ..... 21
*Eacret* v. *Bonner County*, 86 P.3d 494 (Idaho 2004) ..... 14
*Emmett McLaughlin Realty, Inc.* v. *Pima County*, 132 P.3d 290 (Ariz. Ct. App. 2006) ..... 16, 17
*FERC* v. *Mississippi*, 456 U.S. 742 (1982) .... 18
*Fasano* v. *Board of County Comm'rs*, 507 P.2d 23 (Or. 1973), *superseded on other grounds as recognized in Menge* v. *Board of Comm'rs*, 606 P.2d 681 (Or. 1980) ..... 13
*Harris* v. *County of Riverside*, 904 F.2d 497 (9th Cir. 1990) ..... 15, 23
*Hume* v. *Franklin County Fiscal Court*, 276 S.W.3d 748 (Ky. 2008) ..... 12
*Jackson Court Condos., Inc.* v. *City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989) ..... 12
*Landmark Land Co. of Okla.* v. *Buchanan*, 874 F.2d 717 (10th Cir. 1989), *held abrogated on other grounds in Federal Lands Legal Consortium ex rel. Robart Estate* v. *United States*, 195 F.3d 1190, 1195 (10th Cir. 1999) ..... 16, 23

TABLE OF AUTHORITIES — continued

Page

*LC&S, Inc.* v. *Warren County Area Plan Comm'n*, 244 F.3d 601 (7th Cir. 2001) ..... 11, 12, 18
*Mathews* v. *Eldridge*, 424 U.S. 319 (1976) ... 8
*McKinney* v. *Pate*, 20 F.3d 1550 (11th Cir. 1994) ..... 22
*McPherson Landfill, Inc.* v. *Board of County Comm'rs*, 49 P.3d 522 (Kan. 2002) ..... 13, 14
*Nasierowski Bros. Inv. Co.* v. *City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) ..... 14, 15, 22
*O'Neill* v. *Town of Nantucket*, 711 F.2d 469 (1st Cir. 1983) ..... 12
*Olim* v. *Wakinekona*, 461 U.S. 238 (1983) .... 21
*Patsy* v. *Board of Regents*, 457 U.S. 496 (1982) ..... 22
*River Park, Inc.* v. *City of Highland Park*, 23 F.3d 164 (7th Cir. 1994) ..... 12, 15, 20, 21
*Rocky Mountain Materials & Asphalt, Inc.* v. *Board of County Comm'rs*, 972 F.2d 309 (10th Cir. 1992) ..... 23
*Rogin* v. *Bensalem Twp.*, 616 F.2d 680 (3d Cir. 1980) ..... 12
*Wait* v. *City of Scottsdale*, 618 P.2d 601 (Ariz. 1980) ..... 12
*Wax 'N Works* v. *City of St. Paul*, 213 F.3d 1016 (8th Cir. 2000) ..... 21
*Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) ..... 19
*Zinermon* v. *Burch*, 494 U.S. 113 (1990) ..... 20

TABLE OF AUTHORITIES — continued

CONSTITUTION AND STATUTES Page

U.S. Const. amend. XIV, § 1 ..... 2
42 U.S.C. § 1983 ..... 2

## PETITION FOR A WRIT OF CERTIORARI

The City Council of the City of Albuquerque, New Mexico ("the City") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-44a) is reported at 146 N.M. 568, 212 P.3d 1122. The order of the New Mexico Supreme Court denying review of that opinion (App. 153a-154a) is noted at 146 N.M. 733, 215 P.3d 42. The prior opinion of the New Mexico Supreme Court reversing an earlier court of appeals decision and remanding the case to that court (App. 45a-81a) is reported at 144 N.M. 99, 184 P.3d 411. The prior opinion of the court of appeals (App. 82a-139a) is reported at 140 N.M. 751, 149 P.3d 67. The rulings of the New Mexico Second Judicial District Court (App. 140a-152a) are unreported.

## JURISDICTION

The court of appeals entered judgment on May 7, 2009. App. 1a. A timely petition for writ of certiorari to the New Mexico Supreme Court was denied on June 22, 2009. App. 153a. On September 14, 2009, Justice Sotomayor granted Petitioner's application, No. 09A255, for an extension of time to file a petition for writ of certiorari from September 20, 2009, to November 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Deepening two conflicts among the lower courts, the New Mexico Court of Appeals held that ordinary

legislative process in zoning cases can violate the Due Process Clause of the 14th Amendment. Affirming an $8,349,095.00 judgment, the court determined that the City of Albuquerque violated the right of Respondent, Albuquerque Commons Partnership ("ACP"), to procedural due process by rezoning ACP's property, along with other parcels, by means of a legislative action. The court held that the City was required to provide a "quasi-judicial hearing," in which "*ex parte* communications" between legislators and constituents are prohibited. In addition, the court permitted ACP to seek relief as to that violation under 42 U.S.C. § 1983, even though ACP had rejected available state law remedies.

The court acknowledged that its decision directly conflicts with a holding from the Seventh Circuit that "minimal process is due under the Constitution in zoning cases and that a municipality's failure to provide the process required under local law is a matter for state courts, not Section 1983." App. 27a (¶ 43). The decision also conflicts with the holdings of several other state and federal courts. Because of these conflicts and because the court of appeals' decision raises a fundamental and recurring issue regarding the authority of local governments to regulate the use of property within their jurisdiction by legislative action, this Court should grant certiorari.

## I. FACTUAL BACKGROUND

1. Petitioner, the City Council of the City of Albuquerque, New Mexico, has authority to enact zoning laws governing property use within the city. Respondent ACP, from 1984 to 1999, held a long-term leasehold interest in a 28-acre parcel in an area known as the Uptown Sector. App. 46a-47a (¶ 4); *id.* at 83a-84a (¶ 4).

When ACP first leased the property, it was zoned under the City's "1981 Uptown Sector Plan," which established zoning regulations for an urban center. App. 47a (¶ 4). The 1981 Plan "did not mandate minimum development densities, mixed uses, or parking structures," *id.*, although it did impose other restrictions, *id.* at 85a (¶ 6) (providing for "pedestrian-friendly landscaping, open space, and building orientation within the center of the Uptown Sector").

2. In 1991, ACP contracted to sell its leasehold to Opus Southwest Corporation ("Opus"), contingent upon Opus's obtaining approval from the City of its plan to develop the site. App. 48a (¶ 6). In August 1994, Opus submitted to the City a proposal to build a stand-alone "big box" retail project, or megastore, on the property. *Id.* at 86a (¶ 9). There was substantial public opposition to the proposed plan, causing Opus voluntarily to withdraw its proposal. *Id.* at 48a (¶ 6). A few months later, however, Opus submitted a second site plan to the City, proposing another, but somewhat smaller, "big box" retail project. *Id.* (¶ 8).

Before the City took action on Opus's proposal, the City's Planning Department suggested revisions to the Uptown Sector Plan. In particular, the proposed revisions split the commercial zone of that Sector into two new sub-zones: the "Intense Core" and the "Outside of Intense Core." App. 49a (¶ 10). New regulations were applied to the Intense Core that "prohibited free-standing retail, imposed limitations on the size of retail buildings, and required mixed uses, with retail comprising no more than 10 percent of space built on a site." *Id.*

These regulations were intended to create "a true urban center" for the City. App. 89a-90a (¶ 15). All of ACP's property was located in the Intense Core, as

was land held by two other property owners. *Id.* at 50a (¶ 11).

3. In 1995, a series of public hearings on the proposed revisions to the existing Uptown Sector Plan were held before the City's Environmental Planning Commission, the Land Use Planning and Zoning Committee, and the full City Council. App. 50a-52a (¶¶ 12-14); *id.* at 90a-93a (¶¶ 17-24). Both supporters and opponents of the proposed Plan — including ACP and Opus — testified. *Id.* at 50a-52a (¶¶ 12-14); *id.* at 90a-93a (¶¶ 17-24). During the course of the hearings, various City Council members proposed amendments to the plan that were "the result of negotiation among councilors, their constituents in the neighborhoods surrounding the Uptown Sector, and Uptown Sector businesses"; all amendments were circulated for public review. *Id.* at 93a (¶ 23). After adoption of several amendments and "extensive argument both for and against the plan," the City Council voted 7-0 in favor of it. *Id.* (¶ 24). The City Council "found that Uptown, as an urban center, affects the entire City and that Uptown's land use, transportation, and development have an impact on the safety and air quality of the entire metropolitan area." *Id.*

Opus's proposed site plan did not comply with the new zoning requirements. App. 52a (¶ 14). The New Mexico Supreme Court later found that Opus's site plan would have been permissible under the older requirements. *Id.* at 70a-71a (¶¶ 41-42).

## II. PROCEEDINGS BELOW

1. ACP sought review in state district court of the City's decision to adopt the new 1995 Uptown Sector Plan. ACP asserted a claim for damages under 42 U.S.C. § 1983 and a claim that enactment of the 1995

Uptown Sector Plan was an unconstitutional taking in violation of the Fifth Amendment of the U.S. Constitution.[1] App. 52a (¶ 15). ACP's § 1983 claim also rested on allegations that the City, in adopting the new Plan, had denied ACP's federal constitutional rights to substantive and procedural due process. *Id.*

The district court ruled that ACP should have been provided with a quasi-judicial hearing, and invalidated the new Plan as to ACP. The court then permitted ACP's § 1983 damages claim, as well as its federal takings claim, to go forward. The court, however, dismissed ACP's substantive due process claim, ruling that the City's adoption of the Plan furthered a legitimate governmental interest and was not arbitrary and capricious. App. 52a (¶ 15).

ACP's federal procedural due process and takings claims were tried to a jury, which returned a verdict for ACP on both claims. App. 53a (¶ 18). After dismissing the jury's award of damages on the takings claim pursuant to the election-of-remedies doctrine, the district court entered judgment for ACP in the amount of $8,349,095.00. *Id.*

2. The New Mexico Court of Appeals reversed. That court found that the City's action in adopting

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[1] ACP also sought injunctive relief pursuant to state law. App. 52a (¶ 15). Although the district court found that the City had violated state law requirements in adopting the 1995 Uptown Sector Plan and ordered the City to consider Opus's proposed site plan under the 1981 Plan, these claims were later declared moot when the owner of ACP's property sold it and the new owner was permitted to develop the property. *Id.* at 52a-53a, 76a (¶¶ 15-17, 54). ACP also raised a state law inverse condemnation claim; that claim was dismissed in the district court, and ACP did not further pursue it. *Id.* at 52a-54a (¶¶ 15-20).

the 1995 Uptown Sector Plan had been a valid "legislative action establishing areawide policy for the future development of the Uptown Sector." App. 131a (¶ 78). According to the court of appeals, the City's decision applied generally across multiple properties in the Intense Core, and applied prospectively — hallmarks of legislative action. *Id.* at 99a-102a (¶¶ 37-39). The fact that Opus's proposed site plan had spurred the City to implement the 1995 Plan was "not determinative." *Id.* at 101a (¶ 39). A "quasi-judicial process" providing notice and a hearing before a neutral tribunal was not required. *Id.* at 101a-102a (¶ 39). Accordingly, because the basis of the jury's verdict was that the "downzoning" (or rezoning to a more restrictive use) of ACP's property "without a quasi-judicial hearing ... resulted in multiple violations of the United States Constitution," the appellate court reversed the verdict. *Id.* at 131a (¶ 78).

3. The New Mexico Supreme Court reversed again. That court rejected the view of the appellate court that the City's action was properly legislative: "When a zoning action is *specifically designed* to affect a relatively small number of properties *and* does not apply to similarly situated properties in the surrounding area or city-wide, that action is quasi-judicial, not legislative." App. 69a (¶ 39). According to the State Supreme Court, "given that the restrictions were limited to three parcels comprising only six percent of the Uptown sector," the City's action "was the type of zoning action that New Mexico courts, as well as courts from other jurisdictions, have traditionally viewed as quasi-judicial in nature primarily because of the disparate impact on only a small number of landowners." *Id.* at 69a-70a, 71a-72a (¶¶ 40, 43). Because the City had

failed to show that the adoption of the 1995 Uptown Sector Plan amendments was legislative in nature, the court held "that the City's decision lacked procedural fairness" and did not comport with federal due process requirements. *Id.* at 76a (¶ 52). The court remanded to the court of appeals to determine whether ACP had a protected property interest and whether it was entitled to damages under § 1983. *Id.* at 79a (¶ 56).

On remand, the court of appeals examined ACP's federal due process claim according to the three-part test set forth by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). App. 18a-19a (¶ 29). The court first held that ACP had a right, under state law, to continued zoning under the earlier zoning provisions. *Id.* at 7a (¶ 10). The court further determined that ACP's property interest in continued zoning was federally cognizable. *Id.* at 7a-8a (¶¶ 11-12) (citing *Hyde Park Co.* v. *Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000)).

Turning to the questions that are the subject of this petition, the court concluded that the process provided in the City's zoning decision did not satisfy federal constitutional requirements. App. 19a (¶ 31). Specifically, because the City had proceeded legislatively, it had imposed no limitations on "*ex parte*" contacts between voting City Council members and constituents. *Id.* at 20a-21a (¶ 32) (noting that, "[p]rior to the adoption of the 1995 [Uptown Sector Plan], a non-counselor contacted a counselor — outside of the hearings — and 'encouraged' her not to propose amendments to the 1995 [Uptown Sector Plan] that would have allowed ACP to proceed with its project"). "Such contacts and influence are common and appropriate in the normal legislative functioning of a city council." *Id.* at 67a (¶ 36 n.3).

But, the court of appeals determined, such contacts are inappropriate in this zoning context because a quasi-judicial process is required by the U.S. Constitution. *Id.* at 20a-21a (¶ 32); see also *id.* at 67a (¶ 37).

Finally, the court ruled that there would have been "no added burden on the City to provide a meaningful opportunity to be heard before an impartial tribunal." App. 21a (¶ 33). Taking all of the factors together, the court "conclude[d] that the balance weighs in favor of providing a property owner with an impartial tribunal — one free from *ex parte* contacts — prior to implementing a piecemeal downzone." *Id.*

Having found a procedural due process violation, the court of appeals considered whether ACP had been required to seek relief pursuant to state law before turning to § 1983. The court first found that the federal Constitution required the City to provide pre-deprivation process, not post-deprivation relief: "[T]he City ... has broad authority to make zoning decisions that can lead to deprivations of constitutionally protected property rights. Part and parcel with that authority is the duty to provide adequate predeprivation procedural protections." App. 25a (¶ 40). The court "recognize[d] that other courts have concluded that minimal process is due under the Constitution in zoning cases and that a municipality's failure to provide the process required under local law is a matter for state courts, not Section 1983." *Id.* at 27a (¶ 43) (citing *River Park, Inc.* v. *City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994)). Still, the court found that "[d]ue process requires notice of the pending deprivation and a meaningful opportunity to be heard." *Id.* Moreover, ACP was "under no obligation to seek condemnation and

compensation before recovering damages for the due process violation." *Id.* at 30a (¶ 46).

The court of appeals thus reinstated the jury award of $8,349,095.00 on ACP's due process claim. Having so held, the court found it unnecessary to address ACP's claim that the rezoning action constituted a taking without just compensation. App. 4a (¶ 4).

## REASONS FOR GRANTING THE PETITION

The decision below deepens a conflict among both state courts and the lower federal courts over the scope of process that is due when local governments engage in zoning actions. Numerous state and federal courts have ruled that zoning actions are by their nature legislative, and are thus not subject to requirements normally applied to judicial or quasi-judicial process, such as a neutral tribunal that is insulated from the *ex parte* contacts between legislators and constituents that are typical for the legislative process. Even when zoning actions affect only a single or small number of property owners, such as when a property owner seeks a variance from applicable zoning regulations, there is a substantial split of authority as to whether ordinary legislative process is sufficient under the Due Process Clause of the 14th Amendment.

These inconsistent rulings cast a cloud over the means that local governments may use to exercise the quintessential state activity of regulation of property use in the public interest. Moreover, the ruling of the court of appeals creates uncertainty as to whether a state is permitted the opportunity first to remedy any procedural violation in its regulation of property use by means of state law, or whether a state is instead immediately exposed to liability pursuant to a § 1983 claim regardless of the availability of state law

remedies. Review by this Court is necessary to address these questions, both of which have divided the lower courts.

## I. THE STATE COURT'S DECISION THAT USING A LEGISLATIVE PROCESS TO EFFECT A ZONING CHANGE VIOLATES DUE PROCESS DEEPENS A SPLIT AMONG STATE AND FEDERAL COURTS.

The New Mexico Supreme Court held that the Due Process Clause of the 14th Amendment barred the City from rezoning ACP's property without first providing a quasi-judicial proceeding that is free from the *ex parte* communications that are typical in the legislative process. App. 64a, 71a-72a, 76a (¶¶ 33, 43, 52); see also *id.* at 18a-21a (¶¶ 29-33). In other words, the court held that the City could not, consistent with constitutional requirements, rezone the Intense Core of Albuquerque's Uptown Sector by means of standard legislative process. The court of appeals further held that a local government's failure to provide a quasi-judicial process presents an immediately cognizable claim under § 1983. *Id.* at 29a-30a (¶ 46). In so ruling, the court conceded that "other courts have concluded that minimal process is due under the Constitution in zoning cases and that a municipality's failure to provide the process required under local law is a matter for state courts, not Section 1983." *Id.* at 27a (¶ 43).

As the court of appeals recognized, state and federal courts widely hold that a legislative process is sufficient to satisfy federal constitutional requirements for rezoning. In *LC&S, Inc.* v. *Warren County Area Plan Commission*, 244 F.3d 601 (7th Cir. 2001), the Seventh Circuit held that "no notice or opportunity to be heard was constitutionally required" when the council of a small town amended its zoning

ordinance to require that the use of property within the town for a "tavern" would require special permission. *Id.* at 603, 605. Notably, because the new provision was solely prospective, the court found it constitutionally valid even though it was "plain" that the plaintiffs were "the only target" of the rezoning. *Id.* at 604-05; see also, *e.g.*, *River Park, Inc.* v. *City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) (holding, when defendant city thwarted plaintiff from making allowable use of property, "the procedures 'due' in zoning cases are minimal," and "[c]ities may elect to make zoning decisions through the political process ... with no hearings of any kind").

Other courts have reached the same conclusion. *Jackson Court Condos., Inc.* v. *City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989) ("[W]here a zoning decision has been made by an elected body such as a City Council, we have characterized the action as legislative or 'quasi-legislative' negating procedural due process claims"); *O'Neill* v. *Town of Nantucket*, 711 F.2d 469, 471 (1st Cir. 1983) ("a zoning or quasi-zoning question does not constitutionally require anything like a judicial hearing"); *Rogin* v. *Bensalem Twp.*, 616 F.2d 680, 693 & n.60 (3d Cir. 1980) (property owner whose land was rezoned had no federal constitutional right to "procedural due process — including hearings, opportunity for confrontation and response, clear standards, an impartial arbiter"); *Hume* v. *Franklin County Fiscal Court* 276 S.W.3d 748, 752 (Ky. 2008) ("As rezoning is a legislative function, judicial concepts, like an impartial tribunal and prohibitions of *ex parte* contacts with the decision makers, do not apply."); *Wait* v. *City of Scottsdale*, 618 P.2d 601, 602 (Ariz. 1980) (rejecting contention that "judicial due

process standards should have been applied" in zoning decision).

Nor is the decision below immunized by the finding of the New Mexico Supreme Court that the zoning action at issue here "had a disparate impact on only a small number of landowners." App. 72a (¶ 43). As explained below, although some courts, like the New Mexico Supreme Court, find zoning actions that apply to a limited number of property owners to be "quasi-judicial" and thus subject to enhanced due process requirements,[2] others have made clear that all zoning actions — whether they affect many landowners or few — may properly be undertaken with no more than an ordinary legislative process. A substantial split of authority exists as to whether enhanced due process requirements exist for zoning actions that focus on a single property parcel or small group of parcels — either by "spot zoning" in a limited area or by reviewing a landowner's application for rezoning or for an exception from zoning requirements.

The approach taken by the New Mexico Supreme Court finds support in the decisions of the courts of last resort in both Kansas and Idaho. In *McPherson Landfill, Inc.* v. *Board of County Commissioners*, 49

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[2] Some states require quasi-judicial process for zoning proceedings as a matter of state law. See, *e.g.*, *Fasano* v. *Board of County Comm'rs*, 507 P.2d 23, 26-28 (Or. 1973) (holding, without reference to federal Due Process Clause, that zoning decision by County Commissioners was a judicial act subject to requirements for judicial acts), *superseded on other grounds as stated in Menges v. Board of County Comm'rs*, 606 P.2d 681 (Or. 1980). States are, of course, entitled to require process in addition to the minimum set by the 14th Amendment. The State Supreme Court here, however, held that the 14th Amendment mandates that all states provide quasi-judicial process in zoning decisions like this one.

P.3d 522 (Kan. 2002), the Supreme Court of Kansas held that when a zoning decision has limited application, federal due process requires notice and a hearing by a neutral tribunal that does not engage in *ex parte* communications.

> [W]here the focus of the zoning authority shifts from the entire city or county to one specific tract of land for which a zoning change is urged, the function of the zoning authority becomes more quasi-judicial in nature than legislative. In such quasi-judicial proceedings, it is incumbent upon the authority to comply with the requirements of due process in its proceedings. Thus, the proceedings must be fair, open, and impartial.

*Id.* at 524. See also *id.* at 531-34 (reviewing under federal Due Process Clause actions of defendant Board of County Commissioners for improper bias and *ex parte* contacts). Likewise, in *Eacret* v. *Bonner County*, 86 P.3d 494 (Idaho 2004), the Idaho Supreme Court ruled invalid the defendant county's decision to grant a single property owner a variance from zoning requirements on the ground that one of the reviewing zoning commissioners' "comments and *ex parte* contacts regarding the subject variance violated the due process rights" of the interested parties under the 14th Amendment. *Id.* at 498, 501.

Some federal courts of appeals also have held that the Due Process Clause requires enhanced, or quasi-judicial, process when a zoning action affects a limited number of property owners. In *Nasierowski Brothers Investment Co.* v. *City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), the Sixth Circuit held that the defendant city's rezoning of a small group of property parcels triggered enhanced federal due process requirements because that rezoning had a significant impact only on the plaintiff. *Id.* at 896-97.

"Although the rezoned strip of land encompassed approximately fifteen separate parcels," the rezoning action "was patently calculated to inflict a disproportionately detrimental injury upon only one landowner." *Id.* at 896 (emphasis omitted). Accordingly, "[t]he City's failure to afford [plaintiff] an opportunity to be heard constituted a denial of procedural due process." *Id.* at 896-97. Likewise, in *Harris* v. *County of Riverside*, 904 F.2d 497 (9th Cir. 1990), the court invalidated an ordinance in which the defendant County rezoned parcels owned by plaintiff and an adjacent landowner from commercial to residential use. *Id.* at 504. The court found that the County's "published general notice" of the proposed rezoning was "constitutionally insufficient," because the plaintiff "was entitled to individual notice of the County's plan to rezone his property." *Id.* This was so because the "change 'exceptionally affected' [plaintiff] 'on an individual basis' by severely altering the permissible uses of [his] land." *Id.* at 502.

These decisions, however, like that of the New Mexico Supreme Court, directly conflict with the holdings of several other courts that zoning actions that substantially affect only one or a small number of property owners are still legislative acts that do not give rise to enhanced due process requirements.

For example, the Seventh Circuit in *River Park* rejected a claim under § 1983 that the defendant city's failure to provide a hearing of any kind as to the plaintiff's request for a variance violated federal due process requirements. 23 F.3d at 165-66. According to the Court: "[T]he procedures 'due' in zoning cases are minimal. Cities may elect to make zoning decisions through the political process ... with no hearings of any kind." *Id.* at 166. Similarly, the Tenth Circuit rejected a procedural due process

challenge to city officials' denial of building permits under § 1983, because "[i]n land use proceedings, parties are simply not entitled to '"anything like a judicial hearing"' with all its adversarial trappings." *Landmark Land Co. of Okla.* v. *Buchanan*, 874 F.2d 717, 724 (10th Cir. 1989) (quoting *Chongris* v. *Board of Appeals*, 811 F.2d 36, 41 (1st Cir. 1987)), *held abrogated on other grounds in Federal Lands Legal Consortium ex rel. Robart Estate* v. *United States*, 195 F.3d 1190, 1195 (10th Cir. 1999). See also *Cloutier* v. *Town of Epping*, 714 F.2d 1184, 1191 (1st Cir. 1983) (rejecting procedural due process claim even though no hearing was given before permit revocation; stating "[f]ull judicial-type hearings are not required when local boards engage in the quasi-legislative task of granting or revoking zoning or similar types of permits").

Along the same lines, the California Supreme Court held that "the enactment of a measure which zones or rezones property is a legislative act," and that this principle is subject to "no distinctions based on the size of the area or the number of owners." *Arnel Dev. Co.* v. *City of Costa Mesa*, 620 P.2d 565, 568 (Cal. 1980). That court specifically rejected plaintiff's claim that the federal Constitution mandated that a rezoning of three parcels of property be undertaken according to judicial, rather than legislative, procedures in light of its differential impact. *Id.* at 570-71. The same result was reached in *Emmett McLaughlin Realty, Inc.* v. *Pima County*, 132 P.3d 290 (Ariz. Ct. App. 2006). There, the Arizona Court of Appeals found:

> The passage of a zoning ordinance is the exercise of a legislative function and, thus, is generally not subject to full constitutional due process requirements, including personal notice. This so-

> called legislative act doctrine applies not only to the passage of an original zoning ordinance but also to all zoning ordinances passed by a board of supervisors, including those resolving applications for rezoning a particular piece of property.

*Id.* at 294-95 (citations omitted).

This Court, too, has suggested that the application of zoning rules to a single piece of property need not be determined by judicial procedures. In *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), this Court upheld as constitutionally permissible the defendant city's procedure of approving only those zoning changes that were ratified by a 55% vote of the towns' citizens in a referendum. *Id.* at 670-71. The Court found that zoning decisions reached by referendum were subject to constitutional challenge after-the-fact if "the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power," but that the procedure was not itself constitutionally impermissible. *Id.* at 676-77. Although the Court did not expressly address whether the Due Process Clause imposed the procedural requirements identified by the New Mexico Court of Appeals here, Justice Stevens did so in dissent: "[I]t is elementary that the decision-maker must be impartial and qualified to understand and to apply the controlling rules." *Id.* at 692-93 (Stevens, J., dissenting). That view, however, did not persuade a majority of the Court.

In short, the fundamental question whether the Due Process Clause permits local governments to impose zoning changes — even zoning changes that apply only to one or a few property owners — by means of a legislative process has divided state and federal courts. While the court of appeals found that a City Council member's "*ex parte* communication"

with a member of the public violates Due Process, other courts have correctly concluded that inquiries into *ex parte* contacts, which are customary in the legislative process, have no place in the review of zoning acts. See, *e.g.*, *LC&S*, 244 F.3d at 602 ("'Legislative due process' seems almost an oxymoron."). The deepening conflict is of particular moment because "regulation of land use is perhaps the quintessential state activity." *FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982). Whether the Constitution permits a local government to proceed with this "quintessential state activity" by legislative action, or rather mandates a quasi-judicial process in which *ex parte* contacts between legislators and constituents are prohibited, should not turn on geography. The need for this Court to clarify the applicable constitutional requirements is manifest.

Moreover, this case presents an ideal vehicle in which to resolve the conflict over what due process requires when legislatures adopt zoning changes. Because ACP brought its due process claim under § 1983, there can be no dispute that the holding of the court of appeals rested on federal, not state, law. And because ACP's substantive due process claim was dismissed by the district court and not presented to the court of appeals, it is clear that the sole basis for the court's holding was what *procedures* are due to ACP, not the overall reasonableness of the City's determination.

## II. THE DECISION THAT A PROPERTY OWNER NEED NOT PURSUE STATE LAW REMEDIES BEFORE PROCEEDING UNDER SECTION 1983 CONFLICTS WITH A DECISION OF THIS COURT AND DEEPENS A CONFLICT AMONG THE LOWER COURTS.

The decision of the court of appeals further merits this Court's review because it is inconsistent with the holding of this Court in *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In *Williamson*, the Court held that a claim under § 1983 "that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186-87. The Court grounded its holding in the Just Compensation Clause of the Fifth Amendment:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.

*Id.* at 194 (citation and internal quotation marks omitted).

Following from the principle set forth in *Williamson* is the corollary that the Constitution does not require a state to provide pre-deprivation process for property zoning actions that do not rise to the

level of a taking. This Court has stated that for purposes of procedural due process claims:

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

*Zinermon* v. *Burch*, 494 U.S. 113, 126 (1990). Because, as *Williamson* makes clear, the Constitution permits a state to take a citizen's property outright and provide due process afterward, the Constitution cannot simultaneously expose the state to damages under § 1983 for the failure to provide pre-deprivation process when the incursion into the property interest is *less* extensive than a complete taking. As the Seventh Circuit has explained:

> There is a reason why such scant process is all that is 'due' in zoning cases: so far as the Constitution is concerned, state and local governments are not required to respect property owners' rights, and there is therefore no obligation to provide hearings to ascertain a protected core. State and local governments may regulate and even take property; they must pay for what they take but are free to use the land as they please.

*River Park*, 23 F.3d at 167 (emphasis omitted).

Here, however, the New Mexico Court of Appeals ordered the City to pay $8.3 million in damages on ACP's § 1983 claim that its right to pre-deprivation process had been violated, even though ACP rejected state law remedies to correct the procedural violation, such as a remand to the City for a quasi-judicial

proceeding, and even though ACP's procedural due process and takings claims are both based upon the same government action and the same piece of property. The court concluded that the injury to ACP's due process rights was not the potential loss of the value of its property in the Uptown Sector, but instead its "loss of opportunity to meaningfully participate in a hearing related to the adoption of the 1995 [Uptown Sector Plan]." App. 29a (¶ 46). Process, however, "is not an end in itself." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983). Rather, "[i]ts constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.* Whatever process was due to ACP was not to ensure its "opportunity to meaningfully participate," but instead its opportunity to retain the rightful value of its property. The reasoning of the court of appeals cannot be reconciled with the state's authority, as explained in *Williamson*, to take the full value of ACP's property subject to post-deprivation process according to state law.

Consistent with *Williamson*, the Seventh and Eighth Circuits have held that plaintiffs challenging zoning decisions under the Due Process Clause — like the Takings Clause — must pursue state law remedies. See *Cormack* v. *Settle-Beshears*, 474 F.3d 528, 532 (8th Cir. 2007) ("Because Cormack has not shown that Arkansas lacks an adequate postdeprivation mechanism to provide him with just compensation for the alleged taking, his due process claim must fail."); *Wax 'N Works* v. *City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000) ("Under federal law, a litigant asserting a deprivation of procedural due process must exhaust state remedies before such an allegation states a claim under § 1983."); *River Park*,

23 F.3d at 167 ("[A] property owner may not avoid *Williamson* by applying the label 'substantive due process' to the claim. So too with the label 'procedural due process.' Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court.") (citation omitted). See also *McKinney* v. *Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc) (holding, outside of takings context, that "the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise").[3]

By contrast, the Sixth Circuit has stated that "a procedural due process claim is instantly cognizable in federal court without requiring a final decision on a proposed development from the responsible municipal agency." *Nasierowski Bros.*, 949 F.2d at 89; see also *Bigelow* v. *Michigan Dep't of Natural Res.*, 970 F.2d 154, 160 (6th Cir. 1992) (reading *Nasierowski* to stand for the proposition that "the final decision rule does not apply when the denial of procedural due process itself creates an injury"). Similarly, the Ninth Circuit permitted a procedural due process challenge to a zoning decision without regard to the claimant's pursuit of state remedies:

> Even if the County has not made a final and authoritative determination of the development

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[3] This requirement to pursue state law remedies does not, of course, come from § 1983, *see Patsy* v. *Board of Regents*, 457 U.S. 496, 516 (1982) (holding that the statute does not require exhaustion of state administrative remedies), but from the Due Process Clause; only if the state procedures are deficient can there be a violation of procedural due process.

> allowed on Harris' property, he has been deprived of the commercial use of his land and must pay $2,400 to $3,000 to either regain that use, or prompt the County to make a final determination of how he can use the land.

*Harris,* 904 F.2d at 501. And, the Tenth Circuit permits procedural due process challenges to zoning decisions without resort to state proceedings if the due process claim is based on a property interest that can be characterized as separate from the claimant's real property interest that gives rise to a takings claim. See *Landmark Land Co.*, 874 F.2d at 723 (permitting due process challenge to proceed, although takings claim failed, on the theory that plaintiff "had a property interest in ... specific permits," such that defendant "could not withhold them without affording Landmark due process"); see also *Rocky Mountain Materials & Asphalt, Inc.* v. *Board of County Comm'rs*, 972 F.2d 309, 311 (10th Cir. 1992) .

Thus, in this regard, too, the decision of the New Mexico Court of Appeals deepens a split among the lower courts. Consistent with *Williamson*, the Seventh and Eighth Circuits require resort to state law remedies. The Sixth, Ninth, and Tenth Circuits, however, have reached contrary conclusions. This case presents this Court the opportunity to establish that the reasoning of *Williamson* extends equally to bar § 1983 claims challenging zoning proceedings under the Due Process Clause until state law remedies are pursued.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 5, 2009

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**APPENDIX A**

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

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No. 24,026; consolidated with
24,027; 24,042; and 24,425

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Filing Date: May 7, 2009

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ALBUQUERQUE COMMONS PARTNERSHIP,
*Petitioner-Appellee*,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
*Respondent-Appellant*.

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APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

Susan M. Conway and William F. Lang,
*District Judges*

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OPINION

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CASTILLO, *Judge*.

{1} On motion for rehearing, the opinion filed October 30, 2008, is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied.

{2} The operable event that forms the basis for these consolidated cases[1] occurred over thirteen years ago when the Albuquerque City Council (City) adopted the 1995 Uptown Sector Plan (1995 USP), which affected property leased by Albuquerque Commons Partnership (ACP). Until 1995, the leased property was governed by the 1981 Uptown Sector Plan (1981 USP). In 1991, ACP selected Opus Southwest Corporation (Opus) as the buyer for the leasehold. Opus submitted a site plan for the property in June 1994 and then, in July 1994, withdrew the plan because of public outcry. In September 1994, the City requested a comprehensive overview of the 1981 USP. Before the City could complete the overview, Opus submitted another site plan (ACP/Opus site plan). The City deferred consideration of the ACP/Opus site plan and implemented an expedited schedule to evaluate proposed revisions to the 1981 USP. The City ultimately adopted the 1995 USP.

{3} ACP sought review of the City's adoption of the 1995 USP in the trial court. ACP also claimed damages under 42 U.S.C. § 1983 (2000) for violations of due process and for an unconstitutional taking in violation of the Fifth Amendment. Concluding that the 1995 USP was enacted contrary to law as applied to ACP, the trial court ordered the City to consider the ACP/Opus site plan under the 1981 USP. The City complied and ultimately rejected the ACP/Opus site plan under the 1981 USP. The claims for damages continued to trial, and the jury found for ACP on both the due process and the takings claims. The

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[1] The City separately appealed a jury verdict and two whole-record reviews that were conducted by the trial court of the City's decisions regarding ACP's development of the property. On a motion by the City, we consolidated the three appeals.

takings verdict was dismissed pursuant to the doctrine of election of remedies.

{4} ACP appealed to this Court, and we reversed. *Albuquerque Commons P'ship v. City Council of the City of Albuquerque* (*ACP II*), 2006-NMCA-143, ¶ 2, 140 N.M. 751, 149 P.3d 67. Among other things, we held that (1) the City's adoption of the 1995 USP was a legislative act, (2) ACP was not entitled to quasi-judicial process, and (3) the City did not downzone ACP' s property. *Id.* ¶¶ 36-39, 71. ACP appealed, and on certiorari our Supreme Court held that ACP's property was downzoned by the adoption of the 1995 USP and that as a result, the City had been required to provide ACP with quasi-judicial process. *Albuquerque Commons P'ship v. City Council of the City of Albuquerque* (*ACP III*), 2008-NMSC-025, ¶¶ 33, 43, 144 N.M. 99, 184 P.3d 411. The Supreme Court went on to hold that because the City did not provide these enhanced procedures, ACP's right to due process had been violated and that the 1995 USP was not properly enacted. *Id.* ¶¶ 51-52. Finally, the Supreme Court concluded that the City had wrongfully denied ACP approval of the ACP/Opus site plan under the 1981 USP. *Id.* ¶¶ 58-59. The Supreme Court therefore reversed *ACP II* and remanded the case to this Court to make the following determinations: (1) whether ACP had a constitutionally protected property interest that would satisfy the threshold requirement for a Section 1983 claim, (2) whether the 1995 USP was an unconstitutional taking of ACP's property by the City, and (3) whether damages were properly awarded. *Id.* ¶¶ 53-60. We will also consider the City's challenges to the trial court's award of

attorney fees and costs.[2] We address each issue in turn and hold as follows: (1) we affirm the jury award of damages in the amount of $8,349,095 to ACP on its Section 1983 claim; (2) we need not address the issues related to the takings verdict because we affirm the Section 1983 award; (3) we reverse the award of post-judgment interest; and (4) we affirm the trial court's award of attorney fees and costs.

{5} The facts surrounding the adoption of the 1995 USP, the resulting law suits, and the several appeals are set forth in *ACP II*, 2006-NMCA-143, ¶¶ 4-29, 140 N.M. 751 149 P.3d 67, and in *ACP III*, 2008-NMSC-025, ¶¶ 4-20 144 N.M. 99, 184 P.3d 411. We need not repeat the long and complicated history of the case. Instead, we rely on the short background summary that we have already recited and will include additional facts as necessary. We now turn to the remaining issues on appeal.

*DISCUSSION*

*A. Section 1983 Claim*

{6} In order to prove its claim under Section 1983, ACP was required to show that the City, "acting under color of state law, cause[d ACP] to be deprived of a federally protected constitutional right." *Miles v. Bd. of County Comm'rs*, 1998-NMCA-118, ¶ 6, 125

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[2] The City's appeal as to attorney fees and costs was a separate appeal before this Court. Before the Supreme Court filed ACP III, we reversed the trial court's allocation of costs and fees in a memorandum opinion. *Albuquerque Commons P'ship v. City Council of the City of Albuquerque*, No. 24,425, slip op. at 3 (N.M.Ct.App. Dec.9, 2005). As a result of the holding in *ACP III*, we now consolidate the fees and costs appeal with the other three consolidated cases considered by the Supreme Court in *ACP III*.

N.M. 608, 964 P.2d 169. ACP argued at trial that the protected constitutional right violated by the City was the right to procedural due process. The jury entered a verdict for ACP. In its appeal to this Court, the City challenges the due process verdict on the following grounds: (1) the trial court improperly found that ACP had a constitutionally protected property right; (2) procedural due process protections do not apply in the present case because the adoption of the 1995 USP was a legislative act, and ACP received all of the process that was due; (3) the Section 1983 claim was not ripe; and (4) the trial court improperly awarded damages. In addressing each argument, we look to the holdings of our Supreme Court in *ACP III*—that ACP's property was downzoned, that the City accomplished the downzoning in a manner that violated ACP's due process rights, and that the adoption of the 1995 USP required a quasi-judicial hearing. ACP III, 2008-NMSC-025, ¶¶43, 51, 144 N.M. 99, 184 P.3d 411. We begin with the nature of ACP's property right.

1. *Property Right*

{7} To establish a violation of procedural due process, ACP was required to show that the City deprived ACP of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Here, we focus on the property interest portion of the equation. In order to decide whether a party has a constitutionally protected property right, we first must determine whether there is a state-created substantive property right and then consider whether that right triggers federal due process protections. *Memphis Light, Gas & Water Div. v. Craft* (*Memphis Light*), 436 U.S. 1, 10, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) ("Although the underlying substantive interest

is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." (internal quotation marks and citation omitted)).

*a. State-Created Property Right*

{8} Our Supreme Court has explained that constitutionally protected "property interests are those to which an individual has a claim of entitlement." *Mills v. N.M. State Bd. of Psychologist Exam'rs*, 1997-NMSC-028, ¶ 15, 123 N.M. 421, 941 P.2d 502. Although it is well settled under New Mexico law that a property owner has no vested right in a particular zoning classification, *Aragon & McCoy v. Albuquerque Nat'l Bank*, 99 N.M. 420, 423, 659 P.2d 306, 309 (1983), ACP relies on requirements associated with "downzoning" in order to establish a property right. According to ACP, because its property was downzoned, and not simply re-zoned, the City was required to establish a mistake in the original zoning or subsequent changed conditions in the neighborhood before the zoning could be legally changed. *Miller v. City of Albuquerque*, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976). The requirement enunciated in *Miller* is referred to as the "change or mistake" rule. Our Supreme Court agreed with ACP's position and held that "the City's actions did constitute a downzoning of [ACP's] property without complying with important standards set forth in *Miller and Davis* [*v. City of Albuquerque*, 98 N.M. 319, 321, 648 P.2d 777, 779 (1982)]." *ACP III*, 2008-NMSC-025, ¶ 2, 144 N.M. 99, 184 P.3d 411.

{9} In addition, the City's applicable zoning regulation—Resolution 270-1980—tracks the "change or mistake" requirement. *ACP III*, 2008-NMSC-025, 28,

144 N.M. 99, 184 P.3d 411. In order to implement a map amendment to a zoning classification, Resolution 270-1980 requires the City to "demonstrate that the existing zoning is inappropriate because (1) there was an error when the existing zone map pattern was created, or (2) changed neighborhood or community conditions justify the change, or (3) a different use category is more advantageous to the community." *ACP II*, 2006-NMCA-143, 64, 140 N.M. 751, 149 P.3d 67 (internal quotation marks and citation omitted). In the present case, the Supreme Court has held that the 1995 USP was a map amendment, which triggered the requirements of Resolution 270-1980. *ACP III*, 2008-NMSC-025, ¶ 50, 144 N.M. 99, 184 P.3d 411.

{10} Based on these New Mexico cases and Resolution 270-1980, we agree with the trial court that ACP had a right, under state law, to continued zoning in the face of downzoning or a map amendment unless the City was able to justify a zoning change under the requirements enunciated by Resolution 270-1980 and *Miller*. Accordingly, we conclude that ACP had a state-created property interest.

*b. Federal Protection*

{11} The next inquiry is whether the federal constitution extends its protection to this state-created property right. A party claiming a federally protected property interest must have a "legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "[A] legitimate claim of entitlement is created only when the statutes or regulations in question establish a framework of factual conditions delimiting entitlements which are capable of being explored at a due process hearing." *Eidson v. Pierce*, 745 F.2d 453, 459-60 (7th Cir. 1984). In the context of

municipal land use regulation, "[t]he entitlement analysis centers on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir.2000) (internal quotation marks and citation omitted). Accordingly, we must decide whether the applicable law, Resolution 270-1980 or *Miller*, substantively limited the City's discretion to pass the 1995 USP. *See Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence* (*Jacobs*), 927 F.2d 1111, 1116 (10th Cir. 1991). "Otherwise, the city's decisionmaking lacks sufficient substantive limitations to invoke due process guarantees." *Id.*

{12} As we have explained, Resolution 270-1980 requires the City to justify zone map amendments by establishing (1) errors at the time the existing zone map pattern was created, or (2) changes in the neighborhood or community conditions that justify the amendment, or (3) that a different use category is more advantageous tc the community. These are substantive and direct limitations on the City's discretion: By its own rules, the City cannot make a zone map amendment without demonstrating, in some fashion, at least one of these criteria. *See ACP III*, 2008-NMSC-025, ¶ 28, 144 N.M. 99, 184 P.3d 411 (stating that Resolution 270-1980 requires the proponent of a piecemeal downzoning to establish one of three criteria).

{13} In addition, *Miller* unequivocally limits the City's ability to downzone a particular piece of property. 89 N.M. at 506, 554 P.2d at 668. "[B]efore a piecemeal zoning change is sought, the above principles and considerations *must be taken into account*, particularly when the zoning change of a piece of prop-

erty is sought by the zoning authority instead of by the owner of the property affected." *Id.* (emphasis added) (internal quotation marks and citation omitted). The *ACP III* Court concluded that passage of the 1995 USP created a zone map amendment, 2008-NMSC-025, ¶ 50, 144 N.M. 99, 184 P.3d 411, and that it had the effect of downzoning ACP's property. *Id.* ¶ 43. The requirements of both Resolution 270-1980 and the requirements under *Miller* were therefore triggered; however, *ACP III* again provides guidance. Because rigid application of the *Miller* rule would "unduly impede the zoning authority's ability to make zoning decisions that are ultimately beneficial to the community at large," our Supreme Court concluded that the requirements of "Resolution 270-1980 adequately accommodate[] the need for planning and zoning flexibility." *ACP III*, 2008-NMSC-025, ¶ 30, 144 N.M. 99, 184 P.3d 411. As a result, it was necessary for the City to establish one of the three criteria set forth in Resolution 270-1980, including that "the change is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan." *Id.* (internal quotation marks and citation omitted).

{14} Our Supreme Court explained in *ACP III* that the zoning changes effected by the City in the present case "must be justified pursuant to the *Miller* rule and Resolution 270-1980" and that such changes "require specific factual findings relating to the affected properties." *ACP III*, 2008-NMSC-025, ¶ 32, 144 N.M. 99, 184 P.3d 411. The parties are entitled to individual notice, to "an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and

adequate findings executed." *Id.* ¶ 34 (internal quotation marks and citation omitted). All of these procedural requirements are necessary in order for the City to properly establish the substantive criteria: change, mistake, or a more advantageous use category. *See id.* ¶ 30 (establishing the minimum "proof required to demonstrate a more advantageous use category). When attempting to accomplish the type of downzoning at issue in this case, the City has no discretion to proceed without providing evidence to justify the change in accordance with these criteria. *See id.* ¶ 51 ("The [95 USP] Intense Core restrictions singled out a small section of the Uptown Sector and downzoned that area, requiring the City, as the proponent of the zone change, to justify that change in accordance with the criteria set forth in *Miller* and Resolution 270-1980.").

{15} The focus in this inquiry is not the City's failure or success in establishing change, mistake, or a more advantageous use. Rather, the property right is created in the language of the Resolution, *Miller*, *Davis*, and most recently, *ACP III*, all of which eliminate the City's discretion to engage in spot downzoning without considering the factors. *See ACP III*, 2008-NMSC-025, ¶ 32, 144 N.M. 99, 184 P.3d 411 ("[B]ecause such [spot downzoning] must be justified pursuant to the *Miller* rule and Resolution 270-1980 (or a similar local policy), they require specific factual findings relating to the affected properties."). To reiterate, any failure by the City to actually establish one of the criteria does not lead to a property deprivation or a due process violation redressable under Section 1983. Such a deprivation or violation only arises in the event that a party is denied notice or a meaningful opportunity to be heard.

{16} The City argues that it has enormous discretion in its application of the Resolution 270-1980 factors—particularly in the application of the "more advantageous use" criterion—and that because the factors do not dictate the outcome of the City's spot downzoning decision, Resolution 270-1980 and *Miller* do not create a protected property right. We first observe that our Supreme Court has substantially narrowed the City's discretion in the application of this factor. In *ACP III*, the Court explained that the "proof' of a more advantageous use category "would have to show, at a minimum, that '(1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property.'" 2008-NMSC-025, ¶ 30, 144 N.M. 99, 184 P.3d 411 (quoting *Fasano v. Bd. of County Comm'rs of Wash. County*, 264 Or. 574, 507 P.2d 23, 28 (1973), *superceded by statute as stated in Menges v. Bd. of County Commis of Jackson County*, 44 Or.App. 603, 606 P.2d 681 (1980)).

{17} Second, we are not persuaded that the cases cited by the City require us to conclude that in order for ACP to have a federally protected property interest to be free from spot downzoning absent a *Miller*/*Davis*/Resolution 270-1980 inquiry, the outcome of the City's spot-zoning determination must be predetermined by the governing law. The City cites *Kentucky Department of Corrections v. Thompson* (*Thompson*), 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989), *Hyde Park Co., Jacobs, and Sylvia Development Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995).

{18} In *Thompson*, the Supreme Court of the United States concluded that prison regulations did not place sufficient substantive limitations on the state's discretion to allow a prisoner to receive visitors. 490 U.S. at 464-65, 109 S.Ct. 1904. As a result, the prisoner did not have a protected liberty interest in the regulations that allowed for visitors. *Id.* at 465, 109 S.Ct. 1904. The Court explained that "the most common manner in which a [s]tate creates a liberty interest is by establishing substantive predicates to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Id.* at 462, 109 S.Ct. 1904 (internal quotation marks and citation omitted). Ultimately, the Court reasoned that "[t]he overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions." *Id.* at 464-65, 109 S.Ct. 1904. The Court continued: "Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials." *Id.* at 465, 109 S.Ct. 1904.

{19} The City's reliance on *Thompson* is misplaced. First, the case concerns the constitutional rights of a prisoner, which have been construed narrowly over the past thirty years. *See* Ahmed A. White, *The Concept of "Less Eligibility" and the Social Function of Prison Violence in Class Society*, 56 Buff. L. Rev. 737, 777 (2008) ("[T]he courts made clear that, while they are not entirely beyond the realm of constitutional protection, prisoners only enjoy such constitutional rights as are consistent with legitimate penological interests; and that in determining what those interests are, courts must generally defer to the discretion

of prison officials, granting them wide deference in fashioning and implementing penological policies." (internal quotation marks and footnotes omitted)). Second, the property right in the present case is the right to continued zoning in the face of spot down-zoning, absent a showing of evidence under *Miller/Davis*/Resolution 270-1980. Considering the mandatory language in *Miller* and Resolution 270-1980, ACP could "reasonably form an objective expectation" that its zoning category would remain in effect absent evidence that could establish at least one of the required criteria. *See Thompson*, 490 U.S. at 465, 109 S.Ct. 1904.

{20} In *Hyde Park Co.*, the Tenth Circuit Court of Appeals was faced with a different factual scenario. In that case, a developer applied to the City of Santa Fe for approval of a proposed subdivision plat. 226 F.3d at 1209. The proposal was denied and the developer appealed, arguing that it had a constitutionally protected property right in approval of its plat. *Id.* The *Hyde Park Co.*, Court disagreed because "the applicable ordinances read as a whole fail to place any discernible substantive limitations on the [city's] discretion in this matter." *Id.* at 1212. According to the ordinance in *Hyde Park Co.*, the city "had the power to affirm, reverse, or modify the . . . decision as ought to be made." *Id.* "Without clearly defined limitations on the [city's] exercise of discretion to assist [in the] construction of local law," the Tenth Circuit hesitated "to infer such limits and involve [a] federal court in a land use regulation dispute which is purely a matter of local concern." *Id.* In order to have demonstrated the requisite limitation on the city's discretion, the plaintiffs in *Hyde Park Co.* would have had to show that "a set of conditions exist under state and local law, the fulfillment of which would give rise

to a legitimate expectation" of plat approval—the asserted federally protected right. *Id.* at 1210 (internal quotation marks and citation omitted).

{21} In the present case, ACP had to show a set of conditions existing under local law which, if fulfilled, would give rise to a legitimate expectation that the City would provide evidence regarding the zoning change according to *Miller* and Resolution 270-1980. Unlike the ordinance in *Hyde Park Co.*, Resolution 270-1980 provides "clearly defined limitations" on the City's discretion to engage in spot downzoning, and there is no need to infer substantive limitations—those limitations are delineated in the ordinance. *See* 226 F.3d at 1212.

{22} In *Jacobs*, the Tenth Circuit Court of Appeals also considered whether a zoning body's discretion was sufficiently limited such that the parties had a "legitimate expectation to the rezoning of their property." 927 F.2d at 1116. The landowners in that case argued that certain factors set out in a state court opinion were sufficient to limit the discretion of the city commissioners. *Id.* at 1114, 1116. The *Jacobs* Court disagreed because the state supreme court had acknowledged that the factors were not meant to be limits but, instead, "meant only as suggestions." *Id.* at 1116. Therefore, the state law did not "arm [the] appellants with sufficient rules or mutually explicit understandings that support [their] claim of entitlement." *Id.* at 1117 (second alteration in original) (internal quotation marks and citation omitted). The limitations set forth in *Miller* and in Resolution 270-1980 are not merely suggestions. The *Miller* Court expressed in no uncertain terms that prior to piecemeal downzoning, the stated "principles and considerations must be taken into account." 89 N.M. at 506,

554 P.2d at 668. Resolution 270-1980 states that the applicants "must demonstrate" at least one of the three requirements enumerated in the resolution. The language of *Miller* and Resolution 270-1980 is sufficiently mandatory to support a claim of entitlement.

{23} *Sylvia Development Corp.* is similar to *Hyde Park Co.* and *Jacobs*: a developer applied to the county board of commissioners for a special zoning designation, which was denied after vociferous public outcry. *Sylvia Dev. Corp.*, 48 F.3d at 815, 816. The developer appealed and argued, in relevant part, that it was entitled to approval of its application if all of the criteria set forth in the applicable zoning ordinance were met. *Id.* at 825-26. The Fourth Circuit Court disagreed for two reasons: (1) till county had complete discretion to create the requested special zoning designation because of permissive language in the ordinance and (2) the criteria in the zoning ordinance were merely preconditions to be met by an applicant before the county would consider creating a special zoning designation. *Id.* at 826. As we have explained, Resolution 270-1980 is neither permissive in its language nor does it outline preconditions that a property owner is required to meet. Instead, in the event of a spot downzoning, Resolution 270-1980 and *Miller* require the City to provide proof of the listed criteria. *See ACP III*, 2008-NMSC-025, ¶ 34, 144 N.M. 99, 184 P.3d 411 ("The burden is on the proponent of the zone change to establish that the change is justified.").

{24} We note a further distinction between the present case and *Hyde Park Co.*, *Jacobs*, and *Sylvia Development Corp.* In these three federal cases, the plaintiffs sought to obtain an as yet non-existent

benefit: approval of a plat, *Hyde Park Co.*, 226 F.3d at 1209, a zoning change, *Jacobs*, 927 F.2d at 1113, or a special zoning designation. *Sylvia Dev. Corp.*, 48 F.3d at 815. In the present case, ACP seeks to maintain an already existing benefit—a zoning classification—in the face of the City's attempt to downzone the property. *See ACP III*, 2008-NMSC-025, ¶ 43, 144 N.M. 99, 184 P.3d 411. "[P]rocedural protection of property has been recognized as a valid safeguard of 'interests that a person has already acquired in specific benefits' and as a means 'to protect those claims upon which people rely in their daily lives.'" *Jacobs*, 927 F.2d at 1118 (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. 2701). The City is required to justify piecemeal zone map amendments according to Resolution 270-1980 and piecemeal downzoning under *Miller*. That justification is a benefit that ACP acquired prior to the proposal and adoption of the 1995 USP. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("Those things people can hold or do without the government's aid count as property or liberty no matter what criteria the law provides.").

{25} We consider the present case to bear a certain resemblance to *Memphis Light*. In that case, the United States Supreme Court considered whether homeowners had a constitutionally protected property interest in continued utility service. 436 U.S. at 3, 98 S.Ct 1554. The *Memphis Light* Court concluded that "t]he outcome of that inquiry is clear in this case," *id.* at 9, 98 S.Ct 1554, because the law of the state did "not permit a public utility to terminate service 'at will.' *Id.* at 11, 98 S.Ct 1554. Instead, in that state, a public utility could "terminate service only for cause." *Id.* As a result, the homeowner had a continued right to utility service until the public

utility could establish cause to terminate service. *See id.* In the present case, the City could only adopt the 1995 USP if it could establish at least one of the requirements of Resolution 270-1980—just as the utility could only terminate service for cause. Neither ACP nor the homeowner had "rights of undisputed ownership." *Memphis Light*, 436 U.S. at 11, 98 S.Ct 1554 (internal quotation marks and citation omitted). Nevertheless, both parties asserted a "legitimate claim of entitlement within the protection of the Due Process Clause." *Id.* at 12, 98 S.Ct 1554 (internal quotation marks and citation omitted).

{26} Although ACP's pre-existing benefit, or entitlement, is limited and is triggered only under the conditions explained in *Miller* or outlined in Resolution 270-1980, we conclude that ACP has a federally protected property interest to continued zoning under the narrow circumstances presented by this case. Accordingly, we turn next to consider whether ACP received all of the process that it was due in order to protect its property right.

*2. Process Due*

{27} We next consider whether the process provided by the City was sufficient to safeguard ACP's constitutionally protected property right. The City argues that ACP received all of the process that was due because the City provided and ACP participated in seven hearings about the adoption of the 1995 USP. Further, the City argues that because the adoption of the 1995 USP was a legislative act, constitutional due process was not required. We first note that our Supreme Court held in *ACP III* that the adoption of the 1995 USP was a quasi-judicial, and not a legislative, act. *ACP III*, 2008-NMSC-025, ¶¶ 37-39, 43, 144 N.M. 99, 184 P.3d 411.

{28} We also observe that our Supreme Court in *ACP III* outlined the quasi-judicial hearing process to which piecemeal or spot downzoned property owners are entitled. 2008-NMSC-025, ¶ 34, 144 N.M. 99, 184 P.3d 411. While this process is certainly necessary to satisfy state law, Section 1983 actions are brought under federal law. The United States Supreme Court has explained that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). The *Olim* Court concluded that while a state may choose to require certain procedures, "making that choice . . . does not create an independent substantive right." *Id.* at 250-51, 103 S.Ct. 1741. In particular, the characterization of a zoning process as quasi-judicial does not engender the "expectation of a property interest or otherwise place substantive limitations on official discretion." *Jacobs*, 927 F.2d at 1117. From these authorities, we conclude that the failure to hold a particular type of hearing was not by itself a failure of due process actionable under Section 1983.

{29} "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal quotation marks and citation omitted), *abrogated on other grounds as recognized by State v. Gonzales*, 2001-NMCA-025, ¶ 58 & n.1, 130 N.M. 341, 24 P.3d 776. "[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews*, 424 U.S. at 334, 96 S.Ct. 893; *see also Erica, Inc. v. N.M. Regulation & Licensing Dep't*,

*Alcohol & Gaming Div.*, 2008-NMCA-065, 27, 144 N.M. 132, 184 P.3d 444. That analysis includes three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335, 96 S.Ct. 893. We have already identified ACP's private interest: the right to continued zoning unless the City can justify downzoning according to the requirements of Resolution 270-1980.

{30} The second factor considers (1) the risk of erroneous deprivation absent the requested procedure and (2) the probative value of the additional safeguard. To analyze the second factor, we must first consider what procedure ACP requested. The City points out that ACP had an opportunity to participate in seven hearings and that seven hearings satisfied any procedural due process right. ACP disagrees.

{31} In order to resolve this issue, we need only turn to one aspect of the hearing—the type of tribunal. During its review of the downzoning issue, our Supreme Court concluded that the City made "no effort to provide ACP with an impartial tribunal by limiting *ex parte* contacts on the part of the council members." 2008-NMSC-025, ¶ 36, 144 N.M. 99, 184 P.3d 411. The question remains, however, whether an impartial tribunal would substantially reduce the

risk of erroneous deprivation of ACP's protected right and what the probable value of an impartial tribunal would be.

{32} It is well established that "a fair trial in a fair tribunal is a basic requirement of due process." *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456 43 L.Ed.2d 712 (1975) (internal quotation marks and citation omitted). Our Supreme Court has determined that the City Council was a biased tribunal. *ACP III*, 2008-NMSC-025, ¶ 36, 144 N.M. 99, 184 P.3d 411. Hearings before a biased tribunal create a substantial risk of erroneous deprivation. *See NM Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 27, 142 N.M. 248, 164 P.3d 947 ("Pro-cedural due process requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case." (internal quotation marks and citation omitted)). The present case exemplifies the risk. The City perceived itself to be conducting a legislative hearing. While a quasi-judicial hearing is not required to satisfy due process, a legislative hearing before a legislative tribunal led to actual ex parte contact in this case. *See Withrow*, 421 U.S. at 47, 95 S.Ct. 1456 (explaining that a contention of bias "must overcome a presumption of honesty and integrity of those serving as adjudicators"). Prior to the adoption of the 1995 USP, a non-counselor contacted a counselor—outside of the hearings—and "encouraged" her not to propose amendments to the 1995 USP that would have allowed ACP to proceed with its project. *ACP III*, 2008-NMSC-025, ¶ 36 n. 3, 144 N.M. 99, 184 P.3d 411. The counselor acted on the contact, withdrawing her proposed amendments. *Id.* Thus, this ex parte contact had a direct, negative effect on ACP's protected property right, and an impartial tribunal

would have had a great deal of value as an additional safeguard.

{33} Analysis of the third factor shows that there is no added burden on the City to provide a meaningful opportunity to be heard before an impartial tribunal. Taking all of the factors together, we conclude that the balance weighs in favor of providing a property owner with an impartial tribunal—one free from ex parte contacts—prior to implementing a piecemeal downzone.

*3. Adequacy of State Remedies*

{34} Despite our holding that the City's procedure failed to provide ACP with adequate process to protect its property rights, we continue our analysis to determine whether ACP properly established a Section 1983 cause of action in light of available state-law remedies. *See Starko, Inc. v. Gallegos*, 2006-NMCA-085, ¶19, 140 N.M. 136, 140 P.3d 1085 (explaining that "not all deprivations of property interests, even if they are in violation of state law, are actionable under [Section] 1983" because plaintiffs must show that "state remedies provided inadequate procedural safeguards"). The City makes two arguments in this regard: (1) a due process deprivation is not complete until the process has failed and whether the process has failed cannot be determined until the deprived party has navigated the entire system of available state appeals and (2) any procedural error that may have occurred in the present case was simply a mistake and "is not tantamount to a violation of a federal right." We address each argument in turn.

{35} The City's first argument is based on the multiple levels of state court review that were avail-

able to ACP after the 95 USP passed. The City contends that at the first level of review in the district court, ACP argued against remand for the City to conduct a quasi-judicial review of the ACP/Opus site plan. Thus, the City argues, any due process violation was never complete because review of the passage of the 95 USP was available in the district court, this Court, and our Supreme Court, and ACP refused to participate in that procedure. ACP maintains that no state remedy was available to adequately address its loss. With this argument, ACP appears to focus on its financial loss rather than on any due process violation. It is well established that "[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under [Section] 1983, that does not mean that the state remedies were not adequate to satisfy the requirements of due process." *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Having disposed of ACP's challenge to the adequacy of the available state remedies to address the financial loss, we turn to consider whether the state appellate process was adequate to address the due process violation in the present case.

{36} The Supreme Court of the United States has explained that in some cases, "due process requires a predeprivation hearing before the [s]tate interferes with any liberty or property interest enjoyed by its citizens," *id.* at 537, 101 S.Ct. 1908, and, as a result, state appellate procedures are not sufficient to cure a due process violation. In such cases, "deprivations of property [are] authorized by an established state procedure and due process [requires] predeprivation

notice and [a] hearing in order to serve as a check on the possibility that a wrongful deprivation [c]ould occur." *Id.* at 538, 101 S.Ct. 1908. In other cases, for example in *Parratt* itself, "random and unauthorized" state acts that lead to deprivations of property are cured by a postdeprivation hearing—or an appeal—because a predeprivation hearing is impractical. *Id.* at 541, 543, 101 S.Ct. 1908. We thus consider whether the City's actions were random and unauthorized in order to determine whether the available appellate process was a constitutionally sufficient remedy for ACP's due process deprivation.

{37} The City cites *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), which held that a biased decisionmaker is an inherently random and unauthorized act because bias is not sanctioned by the state. *Id.* at 1563. As a result, the *McKinney* court concluded that the plaintiff was not deprived of due process unless the state refused to address the alleged bias on appeal from the administrative proceeding. *See id.* at 1562. We are unpersuaded by *McKinney* for two reasons.

{38} First, *McKinney* was decided in the context of employment termination proceedings and the long line of cases that establish a fired employee's due process rights. *Id.* ("[I]n the case of an employment termination case, due process [does not] require the state to provide an impartial decisionmaker at the pre-termination hearing. The state is obligated only to make available the means by which [the employee] can receive redress for the deprivations." (internal quotation marks and citation omitted)). Second, although the logic of *McKinney* is superficially attractive—that a biased tribunal is inherently not authorized by the state—the facts of the present case do

not bear out this presumption. The City's improper process was neither unpredictable nor the result of the rogue actions of one city councilor. The City chose to proceed by legislative hearings—a procedure that did not provide an impartial tribunal and allowed for ex parte contact. In addition, we are faced with the rare circumstance of having allegations of bias borne out by the record: a city councilor had indicated one course of action, was contacted by a constituent with an opposing view, and after that contact, the councilor changed her position and her vote. *See ACP III*, 2008-NMSC-025, ¶ 36 n.3, 144 N.M. 99, 184 P.3d 411. The decision to proceed legislatively is not sufficient alone to create a due process violation; it is possible that a legislative hearing could provide a meaningful opportunity to be heard or could be conducted without evidence of ex parte contact resulting in improper influence. Under the facts of the present case, however, as recognized by our Supreme Court in *ACP III*, there is substantial evidence to support the jury's decision that ACP did not receive an impartial tribunal and that the flawed process was selected and endorsed as an official act of the whole governmental power of the City. *See id.* As a result, we are unpersuaded by the presumption applied in *McKinney*.

{39} The present circumstances are more closely aligned with *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The plaintiff in *Zinermon* was admitted as a voluntary mental patient even though he was incompetent to provide informed consent for his admission. *Id.* at 114-15, 110 S.Ct. 975. The defendants argued that a postdeprivation remedy was sufficient, in lieu of a Section 1983 action, because the constitutional deprivation was the result of a random and unauthorized action

by a state employee. *Id.* at 115, 110 S.Ct. 975. The Supreme Court of the United States explained that generally, "the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Id.* at 127, 110 S.Ct. 975. The random and unauthorized rule articulated in *Parratt* represents "a special case . . . in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the [s]tate could be expected to provide." *Zinermon*, 494 U.S. at 128, 110 S.Ct. 975. In *Zinermon*, the state statute delegated broad authority to hospitals to admit patients, effectively without informed consent. *Id.* at 135, 110 S.Ct. 975. As a result, the hospital staff had "state authority to deprive pensons of liberty [and] the Constitution imposed on them the [s]tate's concomitant duty to see that no deprivation occur without adequate procedural protections." *Id.* The *Zinermon* Court concluded that the postdeprivation procedures were inadequate because the deprivation was not unpredictable, predeprivation procedures were not impossible, and the deprivation was not unauthorized. *Id.* at 136-38, 110 S.Ct. 975.

{40} In the present case, the City—as it strenuously argues—has broad authority to make zoning decisions that can lead to deprivations of constitutionally protected property rights. Part and parcel with that authority is the duty to provide adequate predeprivation procedural protections. Similar to the deprivation in *Zinernon*, an impermissibly biased tribunal was not unpredictable: the City's decision to proceed legislatively carried with it the risk of ex parte contact and bias and, based on the record, the risk was elevated to reality. In addition, it was not impossible for the City to provide an unbiased tribunal. In *Parratt*, the deprivation involved the loss of personal

property by prison officials—an action which was impossible for the state to predict and prevent by predeprivation hearing. 451 U.S. at 541, 101 S.Ct. 1908. In the present case, the City was contemplating spot downzoning of ACP's property, had a working knowledge of the common procedures involved in legislative hearings, and could have anticipated that councilors would be contacted outside of the official proceedings. It cannot be said that the instance of actual bias that resulted from the procedures employed was unpredictable. Finally, we have already addressed the argument that the biased tribunal was unauthorized and need not repeat our analysis here.

{41} We now reach the City's second argument, which concerns the decision to proceed legislatively. The City maintains that its decision to proceed legislatively was merely a procedural error that does not rise to the level of a constitutional violation and that if ACP is permitted to recover under Section 1983 based on a procedural flaw in the proceedings, property owners will have "the unilateral option to cash in on any procedural flaw in an administrative proceeding by declining remand and pursuing a [Section] 1983 action." We disagree.

{42} The bias in the present case was more than a procedural flaw because ACP had a protected property interest, it was entitled to due process, and there is evidence of actual bias in the process afforded by the City. An unbiased tribunal was a constitutional requirement in the present case. *See* 1 E.C. Yokley, *Zoning Law and Practice* § 3A-1[d], at 3A-23 (4th ed. 2008) ("Procedural due process, however, will apply where a decision is administrative or quasi-judicial *and* the property owner has an entitlement rather than an expectancy to whatever

he or she sought." (footnotes omitted)). In addition, the decision to proceed under Section 1983, rather than to pursue administrative remedies, is a tactical and risk-laden choice. *See* 2 Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 17:3, at 17-7 to 17-8 (2008) (discussing the tactical reasons for resorting to a Section 1983 action or for voluntarily submitting claims to administrative proceedings). The litigant takes the risk of receiving no remedy at all should he neglect to pursue administrative remedies, and the Section 1983 action may be blocked by the myriad of requirements that stand between a plaintiff and relief.

{43} We recognize that other courts have concluded that minimal process is due under the Constitution in zoning cases and that a municipality's failure to provide the process required under local law is a matter for state courts, not Section 1983. *See River Park, Inc.*, 23 F.3d at 166-67. The *River Park, Inc.* court succinctly explained that "the due process clause permits municipalities to use political methods to decide, so that the only procedural rules at stake are those local law provides, and these rules must be vindicated in local courts." *Id.* at 167. Nevertheless, our analysis of the present case leads to the conclusion that ACP had a property right that was to be afforded federal due process protections. Due process requires notice of the pending deprivation and a meaningful opportunity to be heard. In the present case, the meaningful opportunity to be heard was foreclosed by evidence of actual and impermissible bias on the tribunal—bias that was the foreseeable result of the political process chosen by the City as its official act to effectuate the deprivation of ACP's property. Under the unusual circumstances of this case, we therefore hold that ACP's Section 1983

action was not foreclosed by available state remedies and that the City's failure to provide ACP with an impartial tribunal violated ACP's right to procedural due process. *See ACP III*, 2008-NMSC-025, ¶ 52, 144 N.M. 99, 184 P.3d 411 ("[T]he City's decision lacked procedural fairness and did not comport with due process of law.").

*4. Ripeness of the Section 1983 Claim*

{44} The City contends that because ACP prevailed on both the due process and the takings issues at trial, ACP cannot recover damages for the Section 1983 claim until it has attempted to recover compensation for the taking. As a result of ACP's failure to seek recovery for the taking, the City argues that the due process claim is not ripe. For support, the City cites *Rocky Mountain Materials & Asphalt, Inc. v. Board of County Commissioners* (*Rocky Mountain*), 972 F.2d 309 (10th Cir. 1992). In that case, the Tenth Circuit provided the following explanation:

> When a plaintiff alleges that he was denied a property interest without due process, and the loss of that property interest is the same loss upon which the plaintiff's takings claim is based, we have required the plaintiff to utilize the remedies applicable to the takings claim. It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause. Accordingly, until a plaintiff has resorted to the condemnation procedures to recover compensation for the alleged taking, the procedural due process claim is likewise not ripe because it is in essence based on the same deprivation.

*Id.* at 311 (internal quotation marks and citation omitted). ACP argues that (1) federal ripeness jurisprudence does not apply, (2) the takings claim was not coextensive with the due process claim, and (3) no state remedy existed for the takings claim, and ACP was therefore not required to pursue a non-existent remedy. For the reasons listed below, we agree with ACP that the takings claim and the due process claim were not coextensive, and we therefore do not address ACP's other points.

{45} *Rocky Mountain* identified two sets of circumstances. In one scenario, the loss of the property interest is the same loss upon which the takings claims is premised. *Id.* This is the scenario which the City argues is similar to the present case. However *Rocky Mountain* goes on to explain that "[t]here are many intangible [property] rights that merit the protection of procedural due process although their infringement fall short of an exercise of the power of eminent domain for which just compensation required under the Fifth and Fourteenth Amendments." *Id.* (alterations in original), (internal quotation marks and citation omitted).

{46} In the present case, the property right that forms the basis for the due process claim is an intangible right—the right to continuation of a certain zoning classification until the City can establish specific circumstances, as we have identified in preceding paragraphs. ACP's loss resulting from the due process violation was loss of opportunity to meaningfully participate in a hearing related to the adoption of the 1995 USP. Our Supreme Court has determined that ACP's deprivation of this meaningful hearing resulted in its inability to develop its property. *See ACP III*, 2008-NMSC-025, ¶ 59, 144 N.M.

99, 184 P.3d 411. The jury was instructed accordingly on damages for that claim: place ACP in the position it would have been in had it been permitted to develop its property as proposed. The basis for the takings claim was that the passage of the 1995 USP did not advance a legitimate public interest and deprived ACP of all economically viable use of the property without compensation. The takings damages instruction directed the jury to award the value of the use of the property taken. The differences between the claims were reflected in the jury's verdict on damages—six million dollars for takings and more than eight million dollars for due process. It is further apparent that the right to receive meaningful process could not be redressed by the remedy for the takings claim—adequate compensation for deprivation of the use of property. We therefore conclude that the two claims were not coextensive and that ACP was under no obligation to seek condemnation and compensation before recovering damages for the due process violation.

*5. Damages Under the Section 1983 Claim*

{47} In Section 1983 cases, the plaintiff must prove a causal connection between the wrongful conduct and the injury in order to justify an award of compensatory damages. *Jacobs v. Meister*, 108 N.M. 488, 495-96, 775 P.2d 254, 261-62 (Ct. App. 1989), *disapproved of on other grounds by Carrillo v. Rostra*, 114 N.M. 607, 623 n. 16, 845 P.2d 130, 146 n. 16 (1992). The City contends that ACP's evidence relating to damages measured only the loss of profit that resulted from the inability to develop the property as planned. Specifically, the City argues that ACP was required to prove that if the City had provided due process, the 1995 USP would not have been approved

and that the ACP/Opus site plan would have been approved under the 1981 USP. We disagree.

{48} "It is recognized that a Section 1983 action is a species of tort liability, and that the common law of tort damages will be a starting point for Section 1983 damages[.]" *Wells v. County of Valencia*, 98 N.M. 3, 5, 644 P.2d 517, 519 (1982). Our Supreme Court has explained that according to long-established principles of tort law, "the purpose of compensatory damages is to make an injured person whole." *Lovelace Medical Center v. Mendez*, 111 N.M. 336, 349, 805 P.2d 603, 616 (1991). The *Mendez* Court continued and stated that "one of the functions of compensatory damages is to indemnify the injured party against financial losses proximately caused by the negligence of another." *Id.* Thus, in the context of the present case, ACP was required to prove that its financial losses were caused by the City's actions.

{49} As we have explained, the City failed to provide adequate process to protect ACP's constitutionally protected property right and, therefore, the passage of the 1995 USP violated ACP's due process rights. Absent the improperly passed 1995 USP, the 1981 USP governed the ACP/Opus site plan. Consequently, we turn to whether the ACP/Opus site plan would have been approved under the 1981 USP.

{50} In *ACP III*, the Supreme Court determined that

> [t]he record shows that the [ACP/]Opus site plan, though it needed some adjustments (adjustments that were in the process of being made at the time the City imposed the moratorium to consider the 1995 [USP] amendments), complied with the requirements of the 1981 [USP] and

> was no different from a number of projects that the City had previously allowed under that sector plan.

2008-NMSC-025, ¶ 59, 144 N.M. 99, 184 P.3d 411. This statement by our Supreme Court is the law of the case. "Under the law of the case doctrine, if an appellate court has considered and passed upon a question of law and remanded the case for further proceedings, the legal question so resolved will not be determined in a different manner on a subsequent appeal." *Scanlon v. Las Cruces Pub. Sch.*, 2007-NMCA-150, ¶ 7, 143 N.M. 48, 172 P.3d 185 (alterations omitted) (internal quotation marks and citation omitted). We therefore conclude that the ACP/Opus site plan would have been approved according to the 1981 USP, *see ACP III*, 2008-NMSC-025, ¶ 58, 144 N.M. 99, 184 P.3d 411, and that ACP proved that its financial losses were caused by the City's failure to provide adequate process.

{51} The City also briefly contends that ACP did not prove a portion of the damages related to reimbursement of a percentage of funds used to construct a road. The Supreme Court did not address this argument in *ACP III*, and we thus consider whether ACP provided substantial evidence to support the jury's verdict that ACP's damages were caused by the City's actions. The City argues that there was no agreement that the City would reimburse ACP for construction of Loop Road, a road adjacent to the site, and that damages related to the road were improperly awarded based on ACP's assumption that the City would reimburse for road construction costs. The record supports ACP's assumption in that there was evidence at trial that the City had paid a percentage of another access

road, that the City had identified the cost of such a road as a cost to the City, and that the 1981 USP required public financing of the road. Accordingly, we conclude that ACP put on evidence to support the jury's assessment of damages in this regard.

*B. Post-Judgment Interest*

{52} We review the trial court's construction of the post-judgment interest statutes de novo. *Bird v. State Farm Mut. Auto. Ins. Co.*, 2007-NMCA-088, ¶ 36, 142 N.M. 346, 165 P.3d 343. New Mexico is somewhat unique in how it handles the payment of post-judgment interest by the state and its political subdivisions. We look to NMSA 1978, § 56-8-4(D) (2004), which exempts the state and political subdivisions from paying post-judgment interest unless otherwise provided by statute or case law. This statute has been construed narrowly, and in order for a prevailing party to recover post-judgment interest from the state or a political subdivision, our courts have required an explicit waiver of sovereign immunity. *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 23, 136 N.M. 647, 103 P.3d 571 (refusing to award post-judgment interest when immunity from post-judgment interest is not expressly waived); *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 47, 125 N.M. 721, 965 P.2d 305 (same). The City argues that because Section 1983 and 42 U.S.C. § 1988 (2000) do not provide for post-judgment interest, the trial court improperly assessed post-judgment interest. ACP counters that post-judgment interest is mandatory in Section 1983 actions filed in federal court and that it should therefore be allowed in state proceedings. We agree with the City.

{53} As the City recognizes, post-judgment interest is routinely awarded in Section 1983 cases filed in

federal court. The basis for those awards, however, is 28 U.S.C. § 1961 (2000). *See, e.g., Transpower Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1423 (10th Cir. 1990) ("[I]nterest shall be allowed on any money judgment in a civil case recovered in a [federal] district court." (internal quotation marks and citation omitted)); *see also* 28 U.S.C. § 451 (1982) (defining "district court" according to Title 5 of Chapter 28 U.S.C. in which 28 U.S.C.§ 132 (1963) describes a district court as "a court of record known as the United States District Court for the district"). Section 1961(c)(4) explicitly provides that it "shall not be construed to affect the interest on any judgment of any court not specified in this section." State courts are not specified in the section; therefore, there is no basis on which to apply the terms of Section 1961 to a Section 1983 claim filed in state court. It becomes clear that the federal precedent which permits post-judgment interest in Section 1983 claims does not supply the necessary authority to satisfy the mandate of New Mexico's Section 56-8-4(D). Apart from the requirements of Section 1961, ACP provides no federal or state authority to establish that prevailing parties in Section 1983 claims filed in state court are entitled to payments of post-judgment interest by a political subdivision of the state. We, too, have researched federal law and can find no additional authority for such a proposition.

{54} We have also conducted a survey of the law in other states. The majority of jurisdictions do permit the recovery of post-judgment interest against the state or political subdivisions, either by statute, by case law, or by both. *See* Alaska Stat. § 09.50.280 (1997); Ariz. Rev. Stat. § 12-823 (1984); 735 Ill. Comp. Stat. 5/2-1303 (1987); Ind. Code § 34-54-8-5 (1998); Kan. Stat. Ann. § 16-204 (1996); N.Y. State Finance

Law § 16 (1982); Okla. Stat. tit. 12, § 727.1(B) (2004); Tenn. Code Ann. § 9-8-307(d) (2005); *State of Ala. Highway Dep't v. Milton Constr. Co.*, 586 So.2d 872, 876 (Ala. 1991); *Ca. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 11 Cal.4th 342, 45 Cal.Rptr.2d 279, 902 P.2d 297, 300 (1995); *Palm Beach County v. Town of Palm Beach*, 579 So.2d 719, 720 (Fla. 1991); *Profit Recovery Group, USA, Inc. v. Comm'r, Dep't of Admin. & Fin. Servs.*, 2005 ME 58, ¶¶ 32-33, 871 A.2d 1237; *Md. State Highway Admin. v. Kim*, 353 Md. 313, 726 A.2d 238, 241 (1999); *Lienhard v. State*, 431 N.W.2d 861, 865-66 (Minn. 1988); *City of Jackson v. Williamson*, 95-CT-01072-SCT (¶¶14-15) 740 So.2d 818, 821-22 (Miss. 1999); *Nault v. N & L Dev. Co.*, 146 N.H. 35, 767 A.2d 406, 407, 409 (2001); *Judy v. Ohio Bureau of Motor Vehicles*, 100 Ohio St.3d 122, 2003-Ohio-5277, 797 N.E.2d 45, at ¶ 32; *Woods v. Dep't of Transp.*, 163 Pa.Cmwlth. 379, 641 A.2d 633, 635 (1994); *Mulvaney v. Napolitano*, 671 A.2d 312, 313 (R.I. 1995); *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 140 (Utah Ct.App. 1997).

{55} There are a handful of other states that, as a general proposition, do not permit successful plaintiffs to recover post-judgment interest on verdicts against the state. *See Chun v. Bd. of Trs. of the Employees' Ret. Sys.*, 106 Hawai'i 416, 106 P.3d 339, 356 (2005) (requiring express statutory relinquishment of the state's sovereign immunity from post-judgment interest); *Kenton County Fiscal Ct. v. Elfers*, 981 S.W.2d 553, 559-60 (Ky.Ct.App. 1998); *C & M Constr. Co. v. Commonwealth*, 396 Mass. 390, 486 N.E.2d 54, 56 (1985); *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wash.2d 439, 842 P.2d 956, 966 (1993) (en banc). Montana is unique in that it provides a grace period of sorts. Its legislature has directed that under most circumstances, "if a governmental entity

pays a judgment within 2 years after the day on which the judgment is entered, no penalty or interest may be assessed." Mont. Code Ann. § 2-9-317 (1997).

{56} None of the states with law comparable to New Mexico have addressed the specific question of post-judgment interest in a Section 1983 case filed in state court. Our research thus reveals that there is no support for ACP's position that the City is required to pay post-judgment interest in this case.

{57} ACP argues that the denial of post-judgment interest for Section 1983 claims brought in state court will have a twofold effect. First, ACP quotes *Wells* to argue that "[t]he Legislature cannot enact a law which would have the practical effect of depriving a party of his rights secured by the United States Constitution." 98 N.M. at 7, 644 P.2d at 521. We note that Section 56-8-4(D) circumscribes only a party's ability to collect post-judgment interest against the state and political subdivisions; in no way does the statute prevent a party from bringing a cause of action against the state or its political subdivision in order to vindicate constitutional rights. Second, ACP contends that "[s]tate law that creates different outcomes in federal and state court cannot be given effect." For support, ACP cites *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988). *Felder* considered whether a party must comply with a state's pleading procedures in order to properly bring a Section 1983 claim. *Felder*, 487 U.S. at 138, 108 S.Ct. 2302. The United States Supreme Court held that

> [b]ecause the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of [Section] 1983, and because its enforcement in such actions will

> frequently and predictably produce different outcomes in [Section] 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is preempted when the [Section] 1983 action is brought in a state court.

*Id.* We do not believe that the New Mexico prohibition against the recovery of post-judgment interest against the state and political subdivisions "conflicts in both its purpose and effects with the remedial objectives of [Section] 1983." *Id.* The remedial objectives of Section 1983 are certainly achieved when a plaintiff successfully brings suit for damages against the state to vindicate constitutional rights. The recovery of post-judgment interest operates only as an enforcement mechanism to encourage the timely payment of damages after judgment has been entered. *See Bird*, 2007-NMCA-088, ¶ 42, 142 N.M. 346, 165 P.3d 343 ("An award of post-judgment interest serves three purposes: compensating the plaintiff for being deprived of compensation from the time of the judgment until payment . . . by the defendant, discouraging unsuccessful defendants from pursuing frivolous appeals, and minimizing court supervision of the execution of judgments." (internal quotation marks and citation omitted)). We therefore hold that the trial court improperly granted ACP post-judgment interest. Because post-judgment interest is not permissible under Section 56-8-4(D) in these circumstances, we need not consider whether the interest was properly assessed according to the state, and not the federal, interest rate.

*C. Attorney Fees and Costs*

*1. Recovery Under Section 1988 For State Law Claims*

{58} The City first contends that the trial court improperly awarded attorney fees for the first administrative appeal under Section 1988, which only allows recovery for federal civil rights actions. *See N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 12, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986) ("On its face, [Section] 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws."); *Bogan v. Sandoval County Planning & Zoning Comm'n*, 119 N.M. 334, 345, 890 P.2d 395, 406 (Ct. App. 1994) (explaining that a "plaintiff must prevail on some federal civil rights claim in order to be eligible for a fee award" under Section 1988). We review the trial court's award of attorney fees for abuse of discretion. *Nava*, 2004-NMSC-039, ¶ 24, 136 N.M. 647, 103 P.3d 571. In the first administrative appeal, the trial court determined that the City was required to review ACP's proposal under the 1981 USP and not the 1995 USP. The City's position is that no part of the first administrative appeal was necessary in order to vindicate ACP's civil rights. Instead, the City claims that the "sole issue under the petition . . . was an appellate review of the action of the City Council to determine the validity of a zoning decision—the adoption of the 1995 [USP]."

{59} ACP contends that without the work performed for the first administrative appeal, the civil rights claim would not have been successful. The trial court agreed and found that "virtually everything [in the first administrative appeal] focused on whether there was a downzone." As we discussed above,

ACP's identifiable property right is to be free from downzoning unless the City can establish certain criteria. Therefore, there was no abuse of discretion to permit attorney fees for the first administrative appeal because that appeal decided an issue that was crucial to the later and successful constitutional claim. *See N.C. Dep't of Transp.*, 479 U.S. at 15, 107 S.Ct. 336 ("A court hearing one of the civil rights claims covered by [Section] 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation.").

*2. Costs*

{60} The City next argues that specific costs awarded by the trial court were either (1) improperly categorized in the cost bill or (2) not recoverable under state or federal law. We review a trial court's determination of costs for abuse of discretion. *Bird*, 2007-NMCA-088, ¶ 27, 142 N.M. 346, 165 P.3d 343. In a Section 1983 action brought in state court, the prevailing party may recover some expenses of litigation under either federal or state law. Federal law permits the prevailing party to recover attorney fees under Section 1988, and fees may include "reasonable out-of-pocket expenses not normally absorbed as part of law firm overhead." *Brown v. Gray*, 227 F.3d 1278, 1297 (10th Cir. 2000). These costs under Section 1988 are considered to be included in the award of attorney fees; therefore, amounts paid to third parties who are not attorneys are not recoverable under Section 1988. *Brown*, 227 F.3d at 1297. However, other costs may be awarded under the general costs statute. *See id.* Also, Rule 1-054(D)(2) NMRA permits the recovery of certain costs under state law. It includes the recovery of the following expenses under certain

circumstances: filing fees; fees for service of summonses, subpoenas, writs and other service of process; jury fees; transcript fees including those for daily transcripts and transcripts of hearings prior or subsequent to trial; the cost of a deposition if any part is used at trial or in successful support or defense of a motion for summary judgment; witness mileage or travel fare and per diem expenses; expert witness fees for services; translator fees; reasonable expenses involved in the production of exhibits admitted into evidence; official certification fees for documents admitted into evidence; and interpreter fees for judicial proceedings and depositions.

{61} The City contends that ACP improperly categorized some expenses under Section 1988 that were not recoverable under that section and other expenses under Rule 1-054 that were not permitted under that rule. The trial court concluded that any improper categorization of the requests did not "require that the request be disallowed [i]f it is otherwise compensable under the law." Although ACP acknowledges that it claimed some items under both statutes, it repeatedly asserted that double recovery was not sought for expenses that were claimed under both laws. We agree with the trial court that if certain costs were permissible under any law—federal or state—ACP was entitled to recover those costs. *See* Rule 1-054(D)(1) ("[C]osts, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs[.]"). We therefore review each of the City's arguments regarding whether a particular expense is allowable under either Section 1988 or Rule 1-054(D).

{62} The City disputes the trial court's award of copy costs, subpoena fees, and transcript fees. These

arguments are without merit because either Rule 1-054(D)(2) or Section 1988 permit the recovery of these costs, and the City admits that copy costs are billed through as attorney fees. *See Case v. Unified School Dist. No. 233*, 157 F.3d 1243, 1257 (10th Cir. 1998) ("Reasonable expenses incurred in representing a client in a civil rights case should be included in the attorney's fee award if such expenses are usually billed in addition to the attorney's hourly rate."); *see also* Rule 1-054(D)(2)(b) (permitting the recovery of subpoena fees); Rule 1-054(D)(2)(d) (permitting the recovery of transcript fees); *H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2008-NMCA-013, ¶ 27, 143 N.M. 404, 176 P.3d 1136 (holding that Rule 1-054(D)(2)(d) does not require advance approval of transcript requests in order for the cost to be recoverable).

{63} The City also challenges the trial court's award of mediation fees and deposition costs. Section 1988 and Rule 1-054(D) are silent with regard to mediation costs. New Mexico trial courts are cautioned that "[c]osts generally are recoverable only as allowed by statute, Supreme Court rule[,] and case law," Rule 1-054(D)(2), and "[w]e therefore expect . . . courts to exercise their discretion sparingly with regard to costs that are not specifically authorized." *H-S-B P'Ship*, 2008-NMCA-013, ¶ 24, 143 N.M. 404, 176 P.3d 1136. Nevertheless, we conclude that the trial court was within its discretion to award ACP mediation costs because the court "explain[ed] the circumstances justifying the award." *Id.* (internal quotation marks and citation omitted). The trial court informed the parties that ACP was permitted to recover mediation fees because the mediation was court-ordered and because the City did not participate in the mediation with good faith. The trial court

made a similar award for deposition costs and expenses. Although Rule 1-054(D)(2)(e) normally requires that depositions be used at trial or in a successful motion for summary judgment in order for the prevailing party to recover the costs, the trial court in the present case permitted the recovery of all deposition costs. The court explained that this was a complicated case and that the attorneys involved had to sift through a great deal of information in order to determine what testimony was relevant and not duplicative. The trial court noted that none of the depositions taken were unreasonable and as a result awarded all deposition costs under Rule 1-054. Under these circumstances, we see no abuse of discretion in the awards for mediation and deposition costs. *See H-S-B P'Ship*, 2008-NMCA-013, ¶ 28, 143 N.M. 404, 176 P.3d 1136 ("Because the district court affirmatively explained its reasons justifying any deviation from Rule 1-054(D)(2), we affirm its allowance of the . . . costs.").

{64} In its final argument, the City contends that the trial court improperly allowed ACP to recover costs related to expert witnesses. The parties do not dispute that Section 1988 does not permit recovery for expert witnesses in Section 1983 actions. *See* § 1988 (permitting the recovery of expert witness fees in proceedings to enforce the provisions of 42 U.S.C. §§ 1981 or 1981a (2000)—but omitting reference to Section 1983); *see also James v. Sears, Roebuck & Co.*, 21 F.3d 989, 995 (10th Cir. 1994) ("There must be an explicit statutory authorization before expert witness fees will be awarded."). ACP characterized witnesses Phil Garcia and William Kraemer as paralegals and thereby recovered those costs under Section 1988. The City argues that these witnesses were experts, and costs are therefore not recoverable.

The trial court did not permit ACP to recover for all of the work performed by these witnesses because some of the work was more akin to expert work than paralegal work. It was not contrary to logic and reason for the trial court to carefully examine the work done by these witnesses, conclude that some work was investigatory, and permit costs for that work. *See Case*, 157 F.3d at 1249 (applying Section 1988 and concluding that "[a]s to services provided by non-lawyers, if law clerk and paralegal services are . . . not reflected in the [attorney's fee], the court may award them separately as part of the fee for legal services" (some alterations in original) (internal quotation marks and citation omitted)). Accordingly, we hold that the trial court did not abuse its discretion by permitting the recovery by ACP of the costs related to Garcia and Kraemer.

{65} The City also objects to the recovery of costs for Rainhart, Dahlstrom, and Ricker. The trial court found that Rainhart and Ricker testified at trial as experts and that the City did not object. It was not therefore not an abuse of discretion to allow ACP to recover costs for those experts. *See* NMSA 1978, § 38-6-4(B) (1983); *Fernandez v. Española Pub. Sch. Dist.*, 2005-NMSC-026, ¶ 5, 138 N.M. 283, 119 P.3d 163 (acknowledging that a party may recover costs for experts who testify in person or by deposition). We observe that Dahlstrom did not testify by deposition or in person at trial. Instead, ACP argues that it should recover costs for the time that Dahlstrom spent preparing an affidavit for a summary judgment motion. Generally, the preparation of an affidavit by an expert is insufficient to allow the recovery of costs for expert testimony under Rule 1-054(D)(2)(g). *Pierce v. State*, 121 N.M. 212, 231, 910 P.2d 288, 307 (1995). Nevertheless, the trial court questioned the parties

about Dahlstrom's work in this case and learned that the preparation of the affidavit required review of the entire, not insubstantial, record. The trial court's rationale described above, about the complicated nature of this case, also supports the decision to allow Dahlstnom's work to be recovered as costs. As a result, the trial court concluded that the costs were reasonable and we agree. *See H-S-B P'Ship*, 2008-NMCA-013, ¶ 24, 143 N.M. 404, 176 P.3d 1136 ("[C]ourts have the discretion to grant a prevailing party the necessary and reasonable costs incurred in litigating a case.").

*III. CONCLUSION*

{66} We affirm the trial court and the jury verdict on the Section 1983 claim and the award of damages, costs, and fees, with the exception of the award of post-judgment interest. We remand the matter to the trial court for an entry of judgment consistent with this opinion.

{67} IT IS SO ORDERED.

/s/ CELIA FOY CASTILLO
CELIA FOY CASTILLO, Judge

WE CONCUR:

/s/ MICHAEL D. BUSTAMANTE
MICHAEL D. BUSTAMANTE, Judge

/s/ LYNN PICKARD
LYNN PICKARD, Judge Pro Tempore

**APPENDIX B**

SUPREME COURT OF NEW MEXICO

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Nos. 29,791, 29,799

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ALBUQUERQUE COMMONS PARTNERSHIP,
*Petitioner-Petitioner,*

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
*Respondent-Respondent.*

ALBUQUERQUE COMMONS PARTNERSHIP,
*Petitioner-Petitioner,*

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
*Respondent-Respondent.*

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Feb. 18, 2008.
Rehearing Denied May 2, 2008.

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OPINION

BOSSON, *Justice.*

{1} In *Miller v. City of Albuquerque*, 89 N.M. 503, 554 P.2d 665 (1976), this Court held that when a zoning authority rezones a piece of property to a more restrictive use (known as "downzoning"), the zone change must be justified by either a change in the surrounding community or a mistake in the original zoning. We later reaffirmed this rule in *Davis v. City of Albuquerque*, 98 N.M. 319, 648 P.2d 777 (1982),

and applied it to a rezoning pursuant to a sector plan. In this case, the City of Albuquerque adopted a new sector plan that restricted the uses on Petitioner's property. Petitioner argues, and the district court agreed, that, in adopting this sector plan, the City downzoned Petitioner's property without complying with *Miller* and in violation of Petitioner's procedural due process rights. A jury also agreed with Petitioner and awarded damages under 42 U.S.C. § 1983.

{2} The City claims, and the Court of Appeals agreed in reversing the damages award, that *Miller* and *Davis* do not apply to the City's zoning action because (1) the adoption of the sector plan in this case was a legislative act, and (2) the zone change was done pursuant to a text amendment, as opposed to a map amendment, and was therefore not the type of zone change to which *Miller* and *Davis* apply. *See Albuquerque Commons P'ship v. City Council of the City of Albuquerque*, 2006-NMCA-143, 140 N.M. 751, 149 P.3d 67, *cert granted*, 2006-NMCERT-011, 140 N.M. 846, 149 P.3d 943 (*Commons II* ). We now hold that the City's actions did constitute a downzoning of Petitioner's property without complying with important standards set forth in *Miller* and *Davis*, which we reaffirm in this Opinion. Accordingly, we reverse the Court of Appeals and remand for further proceedings.

## *BACKGROUND*

{3} The facts pertinent to this appeal are set forth thoroughly and comprehensively in the Court of Appeals opinion, and we refer only to those portions of the record that are necessary to resolve this appeal.

{4} From 1987 to 1998, Petitioner Albuquerque Commons Partnership ("ACP") held a long-term ground

lease for the old St. Pius High School site in Albuquerque, located north of the Winrock Shopping Center. This property is part of an approximately 460-acre area designated by the City's Comprehensive Plan as the Uptown Sector, one of several urban centers in the city. When ACP leased the 28-acre parcel from the Archdiocese of Santa Fe, the zoning was governed by the 1981 Uptown Sector Plan, under which the majority of the 460 acres, including ACP's property, was zoned SU-3, with the periphery being zoned either SU-2 or R-1. "SU-3 zoning provides suitable sites for high-intensity mixed uses—commercial, office, service, and residential." *Commons II*, 2006-NMCA-143, ¶ 6, 140 N.M. 751, 149 P.3d 67. Important to our later analysis, the 1981 Uptown Sector Plan standards did not mandate minimum development densities, mixed uses, or parking structures, and did not prohibit free-standing buildings, limit the amount of retail use in a development, or require that an entire project be built at once instead of in phases.

{5} From the time the City adopted the 1981 Uptown Sector Plan until it passed the 1995 amendments that are the subject of this suit, the City approved several suburban retail projects within the same area, including a Beall's, a Dillard's addition, a theater, mall expansion, and three new restaurants (all at Winrock), as well as three new restaurants and two new stand-alone retail projects outside Winrock. The City also approved a zone change allowing Toys R Us to demolish office space and replace it with a new stand-alone "medium box" retail building. As we shall see, these projects would not have been allowable under the 1995 Uptown Sector Plan amendments.

{6} In 1991, ACP decided to sell its leasehold, selecting Opus Southwest Corporation ("Opus") to assume development of the property. Opus proposed to either purchase or lease the property if it could obtain approval of its site development plan. In June 1994, Opus submitted a site plan for a stand-alone retail project on ACP's property. This proposal also included a request for a zone map amendment because the site plan included property in the SU-2 zone. Due to strong public opposition, Opus withdrew its proposal on August 31, 1994.

{7} Two weeks after Opus withdrew its first site plan proposal, the City passed Memorial M7-1994, requesting a comprehensive public review and revision of the 1981 Uptown Sector Plan. The City stated its desire to fulfill the vision of the Comprehensive Plan and observed that the 1981 Uptown Sector Plan needed to be revised and strengthened. Thus, the City "requested that the planning department present its 'plan-amendment recommendations and a record of the public review' of the [1981 Uptown Sector Plan] to the City's Environmental Planning Commission (EPC) for consideration by the end of April 1995." *Commons II*, 2006-NMCA-143, ¶ 10, 140 N.M. 751, 149 P.3d 67.

{8} Shortly thereafter, on September 30, 1994, Opus submitted its second site plan, this time proposing a smaller, 17.90-acre low-density "big-box" retail project. This project was to be located entirely within the SU-3 zone and would not require any zone map amendments. *Id.* The Planning Department's initial reports to the EPC on the project stated that the retail uses were allowed by the 1981 Uptown Sector Plan, and proposed consistent EPC findings.

{9} The Opus site plan was originally set for a hearing before the EPC in November 1994, but Opus agreed to a deferral of the hearing until January 1995. EPC then deferred consideration of the site plan until February 9, 1995, due to information that the City was considering a moratorium on development in the Uptown Sector pending revision of the 1981 Uptown Sector Plan. On February 6, 1995, the City Council passed a resolution placing a four-month moratorium on all development within the Uptown Sector.

{10} After instituting the moratorium and deferring consideration of ACP's project, the Planning Department implemented "a fast-track schedule with specific deadlines to prepare information necessary to evaluate proposed revisions to the [1981 Uptown Sector Plan]." *Commons II*, 2006-NMCA-143, ¶ 15, 140 N.M. 751, 149 P.3d 67. The proposed revisions split the existing SU-3 zone into two new sub-zones: the "Intense Core" and the "Outside of Intense Core," separated by the Loop Road. Though the zoning classification remained the same for the entire area, additional regulations applicable only to the Intense Core were significantly more restrictive than those under the 1981 Uptown Sector Plan or in the Outside of Intense Core. The newly-proposed Intense Core regulations prohibited free-standing retail, imposed limitations on the size of retail buildings, and required mixed uses, with retail comprising no more than 10 percent of space built on a site. Additionally, the Intense Core regulations required a specific density of uses, structured parking, and, significantly, construction of an entire project at once, without phasing to match construction demand. In contrast, the Outside of Intense Core regulations allowed retail uses to continue at existing density. Retail was

limited to 10 percent of new space, but "redevelopment/replacement of existing space" was exempted.

{11} ACP's leased property was located entirely within the Intense Core zone. Only two other property owners owned land in the Intense Core, and ACP's property made up two-thirds of the affected land. Further, though all three tracts of land were vacant, only ACP had a pending site plan submitted to the City. As a practical matter, therefore, the new regulations affected primarily ACP and its leasehold interest.

{12} A series of public hearings was scheduled before the EPC, the Land Use Planning and Zoning Committee (LUPZ), and the City Council to consider the amendments. The City initially claimed that the purpose of the amendments was to improve air quality. While the EPC agreed that the 1981 Uptown Sector Plan was in need of revision, it recommended against adopting the 1995 Uptown Sector Plan, finding that "the air pollution problem in the Uptown area would not be significantly affected by the land uses advocated." The EPC also observed that testimony from developers indicated that the Floor Area Ratio minimums and maximums would make development uneconomical. Finally, the EPC found that the proposed amendments to the 1981 Uptown Sector Plan did not meet the requirements for zone changes set forth in the City's Resolution 270-1980, which sets forth policies and criteria that the City must follow when deciding zone change applications. More will be said later about Resolution 270-1980.

{13} The EPC's findings were discussed at a later meeting of the LUPZ. At this hearing, the city attorney stated his opinion that the City did not have

to comply with the requirements of Resolution 270-1980 because those requirements only apply to zone map amendments and the 1995 Uptown Sector Plan amendments were text amendments. A planner with the Environmental Health Division challenged the EPC's finding that the amendments would not significantly improve air quality, stating that the finding was based only on selected data and explaining that when all data were used, mixed uses, together with any amount of transportation management strategies, would result in fewer exceedances of the carbon monoxide standards.[1] Three people with experience in the real estate or financial field also testified that the vacant land in the Intense Core could develop under the 1995 Uptown Sector Plan restrictions. At the close of the testimony, one of the councilors stated that the issues underlying EPC's recommendation against adoption of the 1995 Uptown Sector Plan had been significantly addressed, and LUPZ voted to recommend passage of the revised sector plan.

{14} The City Council then held two public hearings on the 1995 Uptown Sector Plan and on June 19, 1995, the Council voted 7-0 in favor of adopting the amended sector plan. In its resolution adopting the 1995 Uptown Sector Plan, the Council recited introductory "whereas" paragraphs that tracked similar paragraphs in the Council's memorial directing the 1981 Uptown Sector Plan's revision. These broad statements did not address the specific criteria that

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[1] Though this testimony indicates that air quality would be improved with mixed uses combined with transportation management strategies, the district court found that no traffic demand management measures were included in the 1995 Uptown Sector Plan.

apply to rezonings, as will be discussed later in this Opinion. Pursuant to the City's adoption of the 1995 Uptown Sector Plan, the EPC voted to defer consideration of Opus' site plan indefinitely because it did not comply with the revised sector plan.

{15} In July 1995, ACP sought district court review under NMSA 1978, Section 3-21-9 (1965), of the City's decision to adopt the 1995 Uptown Sector Plan. That petition was subsequently amended to add claims under § 1983 for damages allegedly caused by the City's denial of ACP's rights to substantive and procedural due process in the adoption of the 1995 Uptown Sector Plan, for inverse condemnation under state law, and for an unconstitutional taking in violation of the Fifth Amendment. The district court found that the 1995 Uptown Sector Plan amendments downzoned ACP's property and that the City had not complied with applicable state law, as well as its own policies and procedures under Resolution 270-1980, in enacting the new sector plan. Therefore, the court held that the new restrictions in the 1995 Uptown Sector Plan were invalid as applied to ACP and remanded the case to the City for consideration of Opus' site plan under the 1981 Uptown Sector Plan. The court also found that ACP suffered a deprivation of its right to procedural due process, and thus allowed ACP to go forward with its § 1983 damages claim as well as its federal takings claim. The court dismissed the state takings claim along with the § 1983 claim based on substantive due process, ruling that the decision to adopt the 1995 Uptown Sector Plan was not arbitrary and capricious.

{16} While the damages claims proceeded in the district court, ACP requested that the City Council conduct a hearing on the Opus site plan under the

1981 Uptown Sector Plan, pursuant to the district court's ruling in the first administrative appeal. The EPC denied approval of the plan, and in March 2000, the City Council affirmed the EPC's decision and denied approval under the 1981 Uptown Sector Plan.

{17} ACP then sought review of the City Council's ruling in a second administrative appeal to the district court pursuant to NMSA 1978, Section 39-3-1.1 (1998). The district court reversed the City Council's decision denying approval of the site plan under the 1981 Uptown Sector Plan and ordered the City Council to approve the site plan. The City sought an immediate appeal of the district court's ruling in the second administrative appeal to the Court of Appeals, but on October 3, 2002, the Court of Appeals ruled that the order was non-final and not appealable because "ACP's claim for damages for the violation of procedural due process claim [sic][was] still pending." *Albuquerque Commons P'ship v. City of Albuquerque*, 2003-NMCA-022, ¶ 11, 133 N.M. 226, 62 P.3d 317 (Ct.App.2002) (*Commons I* ).

{18} In February 2003, ACP's federal procedural due process and takings claims were tried to a jury. "The jury was instructed that the law of the case was that ACP's property had been downzoned and that ACP was entitled to a quasi-judicial hearing before the property was downzoned." *Commons II*, 2006-NMCA- 143, ¶ 28, 140 N.M. 751, 149 P.3d 67. The jury returned a verdict in favor of ACP on both claims. The verdict for damages for the takings claim was dismissed pursuant to the election of remedies doctrine, and on April 11, 2003, the district court entered final judgment against the City on the due process verdict in the amount of $8,349,095.00.

{19} The City then sought certiorari review of both district court administrative reviews in the Court of Appeals, and also appealed from the district court judgment on the jury verdict. *Commons II*, 2006-NMCA-143, ¶ 29, 140 N.M. 751, 149 P.3d 67. The Court of Appeals granted the petitions seeking review of the two administrative appeals and consolidated all three appeals. *Id.*

{20} The Court of Appeals overturned all three district court decisions. With regard to the first administrative appeal, the Court of Appeals reversed the district court, and held that the 1995 Uptown Sector Plan amendments were legislative text amendments that did not downzone ACP's property, did not need to satisfy the standards of *Miller* and *Davis*, and were therefore valid as applied to ACP. *Id.* ¶¶ 39, 67. Because the other two decisions—the order requiring the City to approve the site plan under the 1981 Uptown Sector Plan and the § 1983 verdict—were based on the district court's initial conclusion with regard to the 1995 Uptown Sector Plan, the Court of Appeals reversed those decisions as well. *Id.* ¶ 78. We granted certiorari to address issues relating to procedural fairness in the passage of the 1995 Uptown Sector Plan amendments and, in particular, the continued applicability of our precedent in *Miller* and *Davis*.

## *DISCUSSION*

### *First Administrative Appeal*

{21} We begin with the first administrative appeal challenging the City's adoption of the 1995 Uptown Sector Plan and its application of the amended sector plan to ACP's proposed project. The Court of Appeals viewed the "pivotal" issue in this matter to be

whether the City's action in adopting the 1995 Uptown Sector Plan was legislative or quasi-judicial in nature. *See Commons II*, 2006-NMCA-143, ¶ 33, 140 N.M. 751, 149 P.3d 67. Finding that the City's action was legislative, the Court of Appeals went on to determine that the City followed proper procedures in adopting the 1995 Uptown Sector Plan, and that there was no downzoning of ACP's property to which the rules pertinent to such actions would apply. *See id.* ¶ 78.

{22} Instead of evaluating the nature of the City's action as quasi-judicial or legislative, we begin with whether the City's adoption of the 1995 Uptown Sector Plan Intense Core restrictions effected a downzoning of ACP's property. We view this to be the critical inquiry because its outcome will determine what processes the City was required to employ, what it was required to show, and how much discretion it had in making its decision. The effect of the City's action on the property owner—whether it constitutes a downzoning or not—determines the degree of process due, not the label the City employs. The City acknowledges that it did not follow quasi-judicial procedures and did not attempt to satisfy the criteria for a downzoning; it simply denies that a downzoning took place. Thus, if the 1995 Uptown Sector Plan did not downzone ACP's property, there was nothing wrong with the City's adoption of that sector plan by a legislative rather than a quasi-judicial process. On the other hand, if the 1995 Uptown Sector Plan amendments did effect a downzoning of ACP's property, then those amendments will be invalid as applied to ACP because they were not justified according to the applicable standards, or passed pursuant to quasi-judicial proce-

dures designed to safeguard the affected property owner's due process rights.

{23} We therefore begin by examining New Mexico's law on rezoning and the standards and procedures that apply to rezoning actions. We then address the City's arguments as to why those standards and procedures do not apply to the adoption of the 1995 Uptown Sector Plan amendments. In doing so, our focus is not on how the City characterized its zoning action and what procedures it used, but on what kind of action the City *in fact* took, and what procedural protections are required to accompany such actions.

*New Mexico Law on Rezoning: Downzoning and the* Miller *Rule*

{24} New Mexico courts use the term "downzoning" to describe rezoning to a more restrictive use. *See KOB-TV, L.L.C. v. City of Albuquerque*, 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708 ("*KOB*") (citing *Davis*, 98 N.M. at 320-21, 648 P.2d at 778-79, for the proposition that "downzoning consists of the rezoning of a property to a more restrictive use"). The term as it has been employed by our courts is essentially a term of art that implies a rezoning action instituted by someone other than the landowner—most often the municipality itself—that is directed at a single parcel or a small number of parcels within a larger zone area, and that expands the restrictions on the use of the property. *See Commons II*, 2006-NMCA-143, ¶ 68, 140 N.M. 751, 149 P.3d 67 ("'Downzoning' is an informal word of art that almost never appears in the statutes or ordinances."); see *also Davis*, 98 N.M. at 321, 648 P.2d at 779 (noting that *Miller* involved a downzoning when the landowner's property was rezoned to a more restrictive use upon the City's

initiative); 3 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* ("Ziegler") § 38:13, at 38-10 to -11 (2005) (noting that "downzonings are seldom initiated by the rezoned property owner, rather, they usually occur at the behest of neighbors or community groups, or at the initiative of the local government itself"). Such a targeted rezoning action is also called a "piecemeal rezoning" and stands in contrast to a "comprehensive rezoning," which "affect[s] a substantial portion of land within the zoning jurisdiction belonging to many landowners." Ziegler § 38:14, at 38-12; *see also KOB*, 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708 (recognizing no downzoning when rezoning involved amendments that applied city-wide); *Turner v. Bd. of County Supervisors of Prince William County*, 263 Va. 283, 559 S.E.2d 683, 685 (2002) (court found that ordinance was "piecemeal downzoning" because it was initiated by the county board, it selectively targeted certain property, and it reduced the potential density of the property owners' land below that recommended by the county's master plan).

{25} New Mexico courts have often used the term "downzoning" as shorthand for those actions that require justification pursuant to the "change or mistake" rule and the zoning authority's own regulations for zoning amendments, which in this case are contained in the City's Resolution 270-1980. The "change or mistake" rule, adopted by this Court in *Miller* and reaffirmed in *Davis*, dictates that the proponent of a zoning change, in this instance the City, must show that such a change is justified due to either a change in conditions in the community or a mistake in the original zoning. *Miller*, 89 N.M. at 506, 554 P.2d at 668 ("The fundamental justification for an amendatory or repealing zoning ordinance is a

change of conditions . . . necessary to protect the public interest [or to] cover and perfect previous defective ordinances or correct mistakes or injustices therein." (Quoted authority omitted.)); *see also Davis*, 98 N.M. at 321, 648 P.2d at 779 (declining to overrule *Miller* and rejecting City's argument that the change or mistake rule should not apply to rezonings accomplished pursuant to amendments to a sector plan). The rule evidences a concern over the stability of zoning regulations and a landowner's right to rely on existing zoning rules. *See Miller*, 89 N.M. at 506, 554 P.2d at 668 (noting that the change or mistake rule supports the "desirable stability of zoning classifications upon which the property owner has a right to rely, since property may be purchased and sold or uses of the property undertaken in reliance on existing classifications"). As we acknowledged in *Miller*, while a property owner does not have a vested right in a particular zoning classification, before a piecemeal zoning change is implemented, due consideration must be given to whether such a change is justified, particularly when the zoning authority and not the landowner seeks to rezone a piece of property. *Id.*

{26} New Mexico courts have not limited the *Miller* rule's applicability to piecemeal rezonings of single parcels, but have extended it to downzonings done pursuant to a comprehensive plan, and even to an upzoning of a specific property upon petition of the landowner.[2] *See, e.g., Davis*, 98 N.M. at 321, 648 P.2d at 779 (noting that the fact that the downzoning in

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[2] An upzoning is a zoning action that rezones a parcel to a less restrictive use. Such zoning actions are usually favored by landowners as they give greater flexibility in the use of property.

that case was done pursuant to a comprehensive plan did not, in itself, distinguish that case from *Miller*); *W. Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, ¶¶ 17-18, 122 N.M. 495, 927 P.2d 529 (holding that an amendment to a sector plan rezoned landowner's property to a less restrictive use, and thus the City had to justify the change in accordance with the *Miller* rule and the City's Resolution 270-1980), *superceded by statute as stated in C.F.T. Dev., LLC v. Bd. of County Comm'rs of Torrance County*, 2001-NMCA-069, ¶ 14, 130 N.M. 775, 32 P.3d 784. The characteristic common to those zoning actions which we have held must be justified by a change or mistake appears to be that they have focused on specific properties or small groups of properties within an otherwise similarly situated class, restricting or allowing uses in ways that do not apply to the surrounding area or similar areas within the city.

{27} To illustrate, in *Davis* we held that a downzoning of an eight-block area pursuant to a sector plan amendment was subject to the change or mistake rule. 98 N.M. at 321-22, 648 P.2d at 779-80. Our decision was informed by evidence that the eight blocks appeared to have been singled out from the rest of the sector plan, being severely downzoned while the other areas within the sector plan were allowed to continue at substantially the same density and with the same types of structures. *Id.* Similarly, in *W. Old Town*, 1996-NMCA-107, ¶ 21, 122 N.M. 495, 927 P.2d 529, our Court of Appeals held that the *Miller* rule applied to the City's approval of an upzoning of a landowner's property when the City "attempted to limit the effect of the rezoning to [that] property alone as a unique situation."

{28} Also applicable to zoning amendments are the City's own rules and policies set forth in Resolution 270-1980. *See W. Old Town*, 1996-NMCA-107, ¶ 18, 122 N.M. 495, 927 P.2d 529. This provision is quoted in its entirety in the Court of Appeals opinion. *See Commons II*, 2006-NMCA-143, ¶ 64, 140 N.M. 751, 149 P.3d 67. Resolution 270-1980 tracks the change or mistake rule, requiring that the proponent of the zoning change "demonstrate that the existing zoning is inappropriate because (1) there was an error when the existing zone map pattern was created, or (2) changed neighborhood or community conditions justify the change." *Commons II*, 2006-NMCA-143, ¶ 64, 140 N.M. 751, 149 P.3d 67. The Resolution also recognizes an additional criterion that can justify a zoning amendment, stating that the proponent of the change may show that "a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan, even though (1) or (2) above do not apply." *Id.*

{29} The relationship between the *Miller* rule and Resolution 270-1980 is unclear; *Miller* and *Davis* appear to speak only in terms of change or mistake as the exclusive criteria upon which a zoning amendment may be based. However, upon closer reading, both cases suggest that a demonstration of a change in the community or a mistake in the original zoning are not the only valid justifications for a zoning change. *Miller* expresses a primary concern over "the desirable stability of zoning classifications upon which the property owner has a right to rely, since property may be purchased and sold." 89 N.M. at 506, 554 P.2d at 668. The change or mistake criteria are referred to as "principles and considerations [that] must be taken into account, particularly when the zoning change of a piece of property is sought by the

zoning authority instead of by the owner of the property affected." *Id.* Thus, change or mistake were not envisioned as strict, all-encompassing requirements, without which a zoning change will never be justified. Similarly, in *Davis*, we recognized that "a more reasonable downzone or a more reasonable comprehensive plan might be sufficient to remove the case from the *Miller* requirements of 'mistake or change.'" 98 N.M. at 321, 648 P.2d at 779. Thus, the third criterion in Resolution 270-1980 is not necessarily incompatible with the principles set forth in *Miller* and *Davis*.

{30} The enhanced procedures that are required to accompany proposed zoning changes directed at a small number of properties constitute the primary protection for the landowner. Rigid application of the *Miller* rule to those proposed changes is therefore unnecessary and can unduly impede the zoning authority's ability to make zoning decisions that are ultimately beneficial to the community at large. Resolution 270-1980 adequately accommodates the need for planning and zoning flexibility. Therefore, without adopting any absolute standards or mechanical tests, we recognize that a municipality may be able to justify an amendment that downzones a particular property by demonstrating that the change is "more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan." Resolution 270-1980; *accord Commons II*, 2006- NMCA-143, ¶ 64, 140 N.M. 751, 149 P.3d 67. The proof in such a case would have to show, at a minimum, that "(1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property." *Fasano v. Bd. of*

*County Comm'rs of Washington County*, 264 Or. 574, 507 P.2d 23, 28 (1973), *superceded by statute as stated in Menges v. Bd. of County Comm'rs of Jackson County*, 44 Or.App. 603, 606 P.2d 681 (1980) (en banc).

*Quasi-Judicial Versus Legislative Zoning Decisions*

{31} The essence of ACP's challenge to the 1995 Uptown Sector Plan Intense Core restrictions is that ACP's property was singled out for a downzoning and the City failed to follow the proper procedures or comply with the requisite criteria in adopting those amendments. The nature of a particular zoning action as either legislative or quasi-judicial is determinative of the procedures that the zoning authority is required to follow in implementing that action. *See Hart v. City of Albuquerque*, 1999-NMCA-043, ¶ 13, 126 N.M. 753, 975 P.2d 366 ("Zoning decisions can be either legislative or quasi-judicial depending upon the impact of the zoning change."); Ziegler § 40:22, at 40-49 (noting that characterization of a rezoning as quasi-judicial can result in the parties being entitled to greater procedural rights and enabling reviewing courts to conduct a closer scrutiny of the merits of the rezoning decision). We note that while we use the labels "legislative" and "quasi-judicial" for the sake of convenience, the real question here is whether the City's adoption of the 1995 Uptown Sector Plan amendments was fair overall, affording ACP adequate due process of law. *See Hacker v. Baesler*, 812 S.W.2d 706, 709 (Ky.1991) ("Much argument has been offered as to whether [a zoning map] amendment process ought to be labeled legislative, judicial, [or] quasi-judicial. [T]he ultimate question is, considering the nature, subject, and purpose of the proceeding and the constitutional rights of the par-

ticipants, how much process of law is due?"); *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W.2d 475, 499 n. 33 (1979) (Levin, J., for affirmance and remand) (cautioning that discussion of the labels "legislative" and "quasi-judicial" "should not be emphasized to the point of distraction from the underlying concepts [because t]he issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities" (quoted authority omitted)), *overruled on other grounds by Schwartz v. City of Flint*, 426 Mich. 295, 395 N.W.2d 678, 679 (1986).

{32} The Court of Appeals aptly explained the differences between legislative and quasi-judicial actions as follows:

> [L]egislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in question.

*Commons II*, 2006-NMCA-143, ¶ 36, 140 N.M. 751, 149 P.3d 67. Small-scale zone changes to which the *Miller* rule and Resolution 270-1980 apply are necessarily quasi-judicial, not legislative, in nature. As we noted earlier, the term "downzoning" is used to indicate a rezoning directed at a small number of properties, newly restricting the uses of those properties in ways that are not applicable to the surrounding area. Such restrictions are limited to

identifiable properties and are not general policy decisions that apply broadly. Further, because such changes must be justified pursuant to the *Miller* rule and Resolution 270-1980 (or a similar local policy), they require specific factual findings relating to the affected properties. *See Strawberry Hill 4 Wheelers v. Bd. of Comm'rs for Benton County*, 287 Or. 591, 601 P.2d 769, 775-76 (1979) (en banc) (noting that where pre-existing criteria guide the result, quasi-judicial proceedings are necessary to elicit the determinative facts). These qualities are the hallmarks of a quasi-judicial action.

{33} Characterization of a zoning action as quasi-judicial carries with it important procedural consequences. Thus, when a zoning authority initiates a proposal to downzone a particular property, the zoning authority must afford enhanced procedural protections to landowners whose properties are the subject of the zone change. *See* Ziegler § 40:22, at 40-49 (noting that characterization of a rezoning as quasi-judicial can result in the parties being entitled to greater procedural rights and enabling reviewing courts to conduct a closer scrutiny of the merits of the rezoning decision). Quasi-judicial zoning matters are not politics-as-usual as far as the municipal governing body is concerned. In such proceedings, the council does not sit as a mini-legislature, as it functions in most matters, but instead must act like a judicial body bound by "ethical standards comparable to those that govern a court in performing the same function." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 40, 888 P.2d 475, 486 (Ct.App.1994).

{34} Therefore, in addition to the right to individual notice, interested parties in a quasi-judicial zoning

matter "are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed." *Fasano*, 507 P.2d at 30. The burden is on the proponent of the zone change to establish that the change is justified. *See South of Sunnyside Neighborhood League v. Bd. of Comm'rs of Clackamas County*, 280 Or. 3, 569 P.2d 1063, 1071 (1977) (en banc). While the specific procedures employed "must adhere to fundamental principles of justice and procedural due process," they are not required to comport with the same evidentiary and procedural standards applicable to a court of law. *W. Bluff Neighborhood Ass'n*, 2002-NMCA-075, ¶ 46, 132 N.M. 433, 50 P.3d 182, *overruled on other grounds by Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806. The issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities. The use of terms such as cross-examination, fair and impartial tribunal, and the like, need not be interpreted in the same sense as it might be in an attempt to reform the judicial process. *Ed Zaagman, Inc.*, 277 N.W.2d at 499 n. 33 (Levin, J., for affirmance and remand). In New Mexico, justification for small-scale zone changes is governed by the criteria set forth in *Miller* and in the municipality's own policies and procedures, which in this case are contained in Resolution 270-1980.

{35} Regardless of the justification, the decision-making body should provide "a clear statement of what, specifically, [it] believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision

is based," and a full explanation of why those facts lead it to the decision it makes. *South of Sunnyside Neighborhood League*, 569 P.2d at 1076. This is critical for facilitating meaningful judicial review of the action, "not for the purpose of substituting judicial judgment for administrative judgment but for the purpose of requiring the [zoning authority] to demonstrate that it has applied the criteria prescribed by . . . its own regulations and has not acted arbitrarily or on an ad hoc basis." *Id.; see Smith v. Bd. of County Comm'rs of Bernalillo County*, 2005-NMSC-012, ¶¶ 32-33, 137 N.M. 280, 110 P.3d 496 (reversing County's denial of a radio tower permit upon finding that, in denying the permit after having initially granted it, officials went against their original interpretation of the relevant ordinance and acted on an ad hoc basis).

*The City's Arguments*

{36} In a conscious decision, the City chose not to follow the procedural standards that attach to a quasi-judicial downzoning. Instead, on advice of counsel, the City adopted the 1995 Uptown Sector Plan amendments in the form of a legislative proceeding, thereby limiting evidence, preventing cross-examination, and making no effort to provide ACP with an impartial tribunal by limiting *ex parte* contacts on the part of the council members.[3] Apart

[3] As an example of the legislative-type lobbying that accompanied the passage of the 1995 Uptown Sector Plan amendments, Ron Nelson, President of the Uptown Association, called Councilor Vicki Perea after she had proposed amendments to the 1995 Uptown Sector Plan that would have eased the impact on ACP. Mr. Nelson encouraged Councilor Perea not to make amendments that would allow the Opus Plan to proceed and stated his belief that if she worked at it, Councilor Perea could get the four

from the broad and conclusory "whereas" points set forth in the ordinance adopting the 1995 Uptown Sector Plan, the City made no findings at all, let alone any specific findings of fact and explanation of how those facts justified the amendments under the *Miller* and Resolution 270-1980 criteria.

{37} However, the City argues, and the Court of Appeals agreed, that the 1995 Uptown Sector Plan Intense Core restrictions were valid because neither quasi-judicial procedures nor justification pursuant to *Miller* and Resolution 270-1980 were required in this case. With regard to the procedures used, the City contends that adoption of the 1995 Uptown Sector Plan was a legislative act, and therefore did not require any enhanced procedural protections for the affected landowners. As to the applicability of *Miller* and Resolution 270-1980, the City claims that those rules do not apply to rezonings accomplished by text amendments. This brings us to the crux of the case and to the decisive points where we disagree with the City and the Court of Appeals. We address each argument in turn.

*Adoption of the 1995 Uptown Sector Plan Intense Core Restrictions Was Not a Legislative Act*

{38} The Court of Appeals determined that adoption of the 1995 Uptown Sector Plan was a legislative act, reasoning that the City's decision was drawn to apply

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votes needed to pass the amendments favored by the Uptown Association. Councilor Perea then withdrew her proposed amendments. Such contacts and influence are common and appropriate in the normal legislative functioning of a city council. However, when a council sits in a quasi-judicial capacity, as it must to effect a downzoning, its members must be insulated from such contact.

in the same way, both currently and in the future, to all similarly situated properties, and was "premised on a desire to clarify and strengthen the [1981 Uptown Sector Plan]." *Commons II*, 2006-NMCA-143, ¶ 39, 140 N.M. 751, 149 P.3d 67. In support of its holding, the Court of Appeals analogized this case to one of its earlier opinions. *See KOB*, 2005-NMCA-049, ¶¶ 37-39, 137 N.M. 388, 111 P.3d 708. In *KOB*, 2005-NMCA-049, ¶ 8, 137 N.M. 388, 111 P.3d 708, the City of Albuquerque adopted an ordinance that disallowed helipads in SU-2/O-1 zones, restricting helipads to SU-1 zones only, with exceptions for law enforcement and hospitals. KOB had obtained a permit and constructed a helipad for its television station under the formerly allowed uses for SU-2/O-1 zones. KOB argued that the ordinance downzoned its property, and thus the City was required to justify the new restrictions in accordance with the *Miller* rule. *Id.* ¶ 27. The Court of Appeals held that the City's adoption of the ordinance was legislative in nature because it established policy for the entire city, such that all SU-2/O-1 zones were subject to the same restrictions: no more helipads were to be allowed. *Id.* ¶ 23. Even though the ordinance had a practical effect on only two landowners by virtue of the fact that only two landowners within the affected zones had helipads, the restrictions were comprehensive in that they applied city-wide. Accordingly, the Court of Appeals upheld the new restrictions as a legislative act to which *Miller* did not apply.

{39} Relying on *KOB*, the Court of Appeals correctly observed that a downzoning does not necessarily occur, requiring quasi-judicial process, simply because only a small number of properties are impacted by the decision or "a particular parcel is in the mind of the zoning authority when it takes action."

*Commons II*, 2006-NMCA-143, ¶¶ 37-39, 140 N.M. 751, 149 P.3d 67. That statement is true as far as it goes, although the narrower the focus of the zoning action, the more likely it is that *Miller* will be implicated. By the same token, the fact that policy decisions are involved does not necessarily mean that a zoning action does not effect a downzoning. "Large-scale decisions of specific applicability frequently, if not inevitably, require of the decision-maker both the creation and the application of policy." *Neuberger v. City of Portland*, 288 Or. 155, 603 P.2d 771, 776 (1979). Nor is a rezoning, that applies to more than a single parcel, necessarily legislative. *See South of Sunnyside Neighborhood League*, 569 P.2d at 1071 n.5 (emphasizing that, by using the terms "single tract" and "single parcel," the court did not intend to adopt a test for determining when a given land-use decision was quasi-judicial or legislative). When a zoning action is *specifically designed* to affect a relatively small number of properties *and* does not apply to similarly situated properties in the surrounding area or city-wide, that action is quasi-judicial, not legislative.

{40} This case involves restrictions of a different nature than those addressed in *KOB*. The 1995 Uptown Sector Plan Intense Core restrictions, did not apply city-wide, or to the other five urban centers in the city, or even throughout the Uptown SU-3 area. Rather, the restrictions were confined to only a small portion of the Uptown sector, comprising about six percent of the total area and affecting only three landowners, by far the largest being ACP. Had the restrictions applied to all SU-3 zones in the city, or even had they applied throughout the Uptown SU-3 sector, then *KOB* might be of some precedential assistance. But, given that the restrictions were

limited to three parcels comprising only six percent of the Uptown sector, the Court of Appeals' reliance on *KOB* is misplaced.[4]

{41} Further, it appears that the 1995 Uptown Sector Plan amendments were not simply designed "to clarify and strengthen the [1981 Uptown Sector Plan]," as the Court of Appeals held. *Commons II*, 2006-NMCA-143, ¶ 39, 140 N.M. 751, 149 P.3d 67. The plain language of the 1981 Uptown Sector Plan, the City's own construction of the 1981 Uptown Sector Plan, and prior City approvals under that plan treated *all* of the SU-3 zone in Uptown as a "suburban commercial" center with shopping centers and restaurants that could be built "to virtually any intensity." Indeed, as stated earlier, an initial staff report on the second site plan submitted by Opus acknowledged that "the zoning on this site plan allows the proposed retail uses." Moreover, the amendments, by not placing limitations on retail uses for redevelopment or replacement of existing developments, were tailored to affect only ACP—the only property owner in the Uptown sector with a pending site plan—while exempting existing businesses.

{42} We are not persuaded by the City's assertion that the 1995 Uptown Sector Plan amendments merely made explicit what was already implicit in the 1981 Uptown Sector Plan. The very fact that the City postponed a decision on ACP's proposal while it rushed the sector plan amendments through a legislative process leads to a fair inference that the 1995

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[4] Because this case is demonstrably different from *KOB*, we need not inquire as to whether *KOB* correctly interprets and distinguishes *Miller* and *Davis*. We do note that this Court never had the opportunity to review that decision because KOB, the losing party on appeal, never sought a writ of certiorari.

Uptown Sector Plan was meant to *change* the former sector plan, not simply clarify it. It is difficult to see why, if the City could have denied ACP's permit under the 1981 Uptown Sector Plan, it did not do so at the outset. Instead, the City felt it necessary to stall consideration of ACP's permit and hastily amend the original sector plan.[5]

{43} Regardless of how the City tries to construe its actions, substantial evidence at trial showed that the 1995 Uptown Sector Plan Intense Core restrictions were directed specifically towards ACP and were not public policy matters of a general character. Those changes amounted to a downzoning of ACP's property and required justification based on the specific, fact-based criteria set forth in *Miller* and Resolution 270-1980. *W. Old Town*, 1996-NMCA-107, ¶ 16, 122 N.M. 495, 927 P.2d 529 ("The procedures for amending a sector plan are . . . the same as those for amending a zoning map."). Thus, the City's adoption of the 1995 Uptown Sector Plan was the type of zoning action that New Mexico courts, as well as courts from other jurisdictions, have traditionally

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[5] We observe that the City had ample opportunity prior to the submission of the Opus site plan to amend the Uptown Sector Plan. Indeed, the City had been in the process of reviewing the 1981 Uptown Sector Plan and developing draft revisions since 1989. The draft revisions submitted prior to ACP's submission of its site plan did not create a new Intense Core zone with heavier restrictions than the surrounding area, and did not restrict stand-alone retail projects, set mixed-use or density requirements, require structured parking, or prohibit phased construction to match demand. These initial draft revisions thus lend further support to the argument that the amendments proposed subsequent to ACP's site-plan, and ultimately passed by the City, were specifically designed to prevent ACP's proposed project.

viewed as quasi-judicial in nature primarily because of the disparate impact on only a small number of landowners. *See, e.g., W. Old Town*, 1996-NMCA-107, ¶ 11, 122 N.M. 495, 927 P.2d 529; *McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County*, 274 Kan. 303, 49 P.3d 522, 524 (2002) ("[W]here the focus of the zoning authority shifts from the entire city or county to one specific tract of land for which a zoning change is urged, the function of the zoning authority becomes more quasi-judicial in nature than legislative."); *South of Sunnyside Neighborhood League*, 569 P.2d at 1071 ("[T]he decision to amend the comprehensive plan as it applies to [a] single parcel of land is a quasi-judicial, rather than a legislative, decision."); *Fleming v. City of Tacoma*, 81 Wash.2d 292, 502 P.2d 327, 331 (1972) (en banc) ("[I]n amending a zoning code, or reclassifying land thereunder, [a municipal legislative body], in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change."), *overruled on other grounds by Raynes v. City of Leavenworth*, 118 Wash.2d 237, 821 P.2d 1204, 1208-09 (1992).

*Rezoning By Text Amendment Versus Map Amendment*

{44} The City presents an alternate argument for not following *Miller* and the Resolution 270-1980 criteria, premised on a purported distinction between zoning text amendments and zoning map amendments. Specifically, the City argues that "the adoption of the [1995 Uptown Sector Plan] *was not a rezoning* of ACP's property but was a text amendment to the zoning code, which strengthened the existing regulations in order to assure development of an urban center, as already required by the [1981

Uptown Sector Plan] and Comprehensive Plan." *Commons II*, 2006-NMCA-143, ¶ 40, 140 N.M. 751, 149 P.3d 67 (emphasis added). The Court of Appeals found the distinction between a zoning text amendment and a zoning map amendment persuasive. We are somewhat skeptical.

{45} In analyzing this argument, the Court of Appeals correctly observed that zoning map amendments "involve[ ] the zoning district reclassification of a particular tract of land by alteration of the official zoning map," while zoning text amendments "do not affect the zoning district classification, but rather change the allowed or permitted uses within a particular zoning district." *Id.* ¶ 42. Thus, "[z]oning text amendments do not affect the zoning district classification, but rather change the allowed or permitted uses within a particular zoning district." *Id.* Relying on two New Mexico Court of Appeals cases, the Court of Appeals found this distinction pivotal, reasoning that "the general term 'rezoning' seems to refer to a zone reclassification by map amendment," but not by text amendment. *Id.* ¶ 44. In other words, the known consequences of a zoning map amendment in terms of *Miller* and Resolution 270-1980 do not apply if the amendment is of the text but not the map. We now turn to an analysis of those two opinions.

{46} In *Mandel v. City of Santa Fe*, 119 N.M. 685, 686, 894 P.2d 1041, 1042 (Ct.App.1995), the City of Santa Fe amended the text of the zoning code to permit the Historic Design Review Board to limit the height of structures within certain historic districts to lesser heights than that allowed by the underlying zoning. Pursuant to this text amendment, the Review Board denied Mandel's proposed construction project

based on the existence of inappropriate second-story structures, and the City affirmed the denial. *Id.* at 687, 894 P.2d at 1043. Mandel claimed that the application of the height amendment to his property was an unlawful downzoning. *Id.* While the Court of Appeals "accept[ed] the notion that the allowable use of [Mandel's] property [had] been restricted," it nevertheless held that Mandel's property had not been downzoned. *Id.* at 688, 894 P.2d at 1044. The Court reasoned that "there was no rezoning that affected only Mandel's property or even Mandel's neighborhood. Rather, the City adopted a height restriction that could be generally applied to all properties in historic districts in the City." *Id.* at 689, 894 P.2d at 1045.

{47} As it did when deciding whether the City's action was legislative or quasi-judicial, the Court of Appeals again looked to *KOB* in its analysis of zoning text amendments. *See Commons II*, 2006-NMCA-143, ¶¶ 44-46, 140 N.M. 751, 149 P.3d 67. As noted previously, in *KOB*, the City of Albuquerque adopted an ordinance that disallowed helipads in SU-2/O-1 zones, restricting them to SU-1 zones with exceptions for law enforcement and hospitals. These changes were made pursuant to text amendments to the zoning code. The *KOB* court, relying in part on *Mandel*, held that because the ordinance established policy for the entire city such that all SU-2/O-1 zones were subject to the same restrictions, the City's actions did not amount to a downzoning requiring a showing of change or mistake.

{48} While it is true that both *KOB* and *Mandel* involved text amendments that were held not to have downzoned the complaining landowner's property, those decisions did not turn on the amendments

being to the text as opposed to the map. Rather, it was because the amendments were not site-specific that there was no downzoning to which the *Miller* rule would apply. As we have discussed, the City's amendments to the Uptown Sector Plan were very much site-specific, and it is this fact that fundamentally distinguishes *KOB* and *Mandel* from the present controversy.

{49} While the restrictions on ACP's property were accomplished by text amendment, that is where the similarity to *Mandel* and *KOB* ends. We agree instead with the district court that the 1995 Uptown Sector Plan Intense Core restrictions effectively created a new sub-zone within the Uptown Sector, regardless of whether such rezoning was accomplished by text amendment or map amendment. The only factor distinguishing this case from *Davis* is that the amendment in *Davis* was to the zoning map, not to the text. As we have indicated, that distinction is not dispositive; a bright-line rule that distinguishes between text amendments and map amendments such that the former can never constitute a rezoning would be a classic elevation of form over substance. We hold that the Intense Core restrictions implemented by the 1995 Uptown Sector Plan rezoned ACP's property to a more restrictive use, an action for which our courts have historically required justification by a showing of change in the community or mistake in the original zoning.

{50} For the same reasons, we reject the City's argument and the Court of Appeals' holding that Resolution 270-1980 does not apply in this case. While it is true that Resolution 270-1980 refers only to zone map changes and not text changes, the practical

effect of the 1995 Uptown Sector Plan was a map amendment, despite the labels used by the City.

{51} In this case, the City accomplished in practical effect through text amendment what would normally be done by map amendment. Indeed, in the 1995 Uptown Sector Plan, the Intense Core and the Outside of Intense Core are each labeled as a "zone." The 1995 Uptown Sector Plan Intense Core restrictions singled out a small section of the Uptown Sector and downzoned that area, requiring the City, as the proponent of the zone change, to justify that change in accordance with the criteria set forth in *Miller* and Resolution 270-1980. The City did not do so. "The City may not ignore or revise its stated policies and procedures for a single decision, no matter how well-intentioned the goal may be." *W. Old Town*, 1996-NMCA-107, ¶ 26, 122 N.M. 495, 927 P.2d 529.

{52} The City has failed to show that the adoption of 1995 Uptown Sector Plan amendments was legislative in nature, or that because the amendments were text amendments they did not rezone ACP's property. There is no legitimate justification for the City's failure to afford the proper procedural protections or comply with the standards set forth in *Miller* and Resolution 270-1980. We hold that the City's decision lacked procedural fairness and did not comport with due process of law.

*The Second Administrative Appeal and ACP's § 1983 Damages Claim*

{53} As described earlier, on remand from the first administrative appeal, the City denied ACP's site plan under the 1981 Uptown Sector Plan, and ACP appealed to the district court. On the second appeal, Judge Lang found that the City had not considered

the site plan as previously ordered by Judge Conway on the first appeal. Judge Lang then found that the site plan complied with the 1981 Uptown Sector Plan and ordered the City to approve the plan. The City appealed this ruling to the Court of Appeals, which held that the ruling was not a final order because the § 1983 damages claim was still pending in the district court. In the consolidated appeal below, the City again argued that the district court lacked the power to order the City to approve ACP's site plan. Because the Court of Appeals found the 1995 Uptown Sector Plan valid, contrary to the district court, the Court of Appeals did not have to reach the merits of the City's position that Judge Lang did not have the authority to order the City to approve the Opus site plan under the 1981 Uptown Sector Plan.

{54} We also do not reach that issue because it is now moot. The Archdiocese of Santa Fe sold ACP's site, and a new development was approved and built by another developer under later revisions to the 1995 Uptown Sector Plan which allowed the increased retail use and phased construction that was denied to ACP. Therefore, the only remaining issues involve ACP's § 1983 damages action and its takings claim.

{55} With regard to the § 1983 damages action, the City argued in the Court of Appeals that ACP had no constitutionally protected property interest, and therefore did not satisfy the threshold requirement for a § 1983 claim. ACP countered that because § 1983 property interests are defined by state and not federal law, New Mexico recognizes a property owner's right to be free from unjustified downzonings directed at his property, as indicated in *Miller* and *Davis*. *See also Smith*, 2005-NMSC-012, ¶ 33, 137 N.M. 280, 110

P.3d 496 ("[Landowners] have a right to use their property as they see fit, within the law, unless restricted by regulations that are clear, fair, and apply equally to all.").[6]

{56} The City also argued that ACP, even if it had a protected property interest, was only entitled to nominal damages because it failed to show that if the City had implemented a fair process and followed the *Miller* and Resolution 270-1980 requirements, the amendments would not have been passed in any event.[7] ACP claimed that this issue had been argued and submitted to the jury, and that the jury's verdict demonstrated that ACP proved its entitlement to compensatory damages. These arguments were not addressed by the Court of Appeals based on its

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[6] Other jurisdictions recognize a protected property interest when a landowner has taken substantial steps in reliance on an existing zoning classification. *See, e.g., Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 897(6th Cir.1991) (landowner who had taken substantial steps in reliance on the existing zoning classification and representations by the city that his planned development was permitted by that zoning had property interest in the old zoning classification within which his development was permitted).

[7] We note that federal case law appears to allocate this burden differently. Thus, when a § 1983 plaintiff successfully proves a violation of procedural due process that results in a deprivation of a protected property interest, it is the *defendant's* (the City's) burden to prove that the same results would have been obtained, even if the plaintiff's due process rights had not been violated. *See, e.g., Gomes v. Wood*, 451 F.3d 1122, 1131 (10th Cir.2006) (stating that "when a procedural due process violation occurs and adverse action results, damages for injuries caused by the adverse action may not be recovered if the *defendant* can prove the action *would have* been taken even absent the violation" (citing *Carey v. Piphus*, 435 U.S. 247, 260, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (emphasis added))).

decision regarding the first administrative appeal. Because we reverse that decision, we remand the case to the Court of Appeals to consider the City's remaining issues argued on appeal in light of our analysis on the first administrative appeal and our discussion of *Miller* and Resolution 270-1980.

{57} With regard to the takings claim, the Court of Appeals observed that ACP's experts, who testified that the 1995 Uptown Sector Plan prevented any type of economically feasible development of the property, did not take into account the effect of the 1981 Uptown Sector Plan on the site plan. The Court of Appeals then stated that the effect of its opinion was "to uphold the City's denial of the site plan under the [1981 Uptown Sector Plan]." *Commons II*, 2006-NMCA-143, ¶ 87, 140 N.M. 751, 149 P.3d 67. Thus, the Court of Appeals reasoned that these expert opinions could not form the basis for the damages awarded by the jury on ACP's takings claim. Having so held, the Court of Appeals concluded that, "[s]ince ACP's proposed development could not have been built under the [1981 Uptown Sector Plan], no damages could have resulted from similar prohibitions under the [1995 Uptown Sector Plan], and ACP therefore failed in its burden to prove that the [1995 Uptown Sector Plan] effected an unconstitutional taking caused by the denial of all economically viable use of the property." *Id.*

{58} We disagree with the Court of Appeals that the site plan was not approvable under the 1981 Uptown Sector Plan. As we have observed, the very fact that the City rushed to enact the 1995 Uptown Sector Plan amendments before it considered ACP's proposed site plan—a plan which the planning department had already deemed to be in compliance with

the 1981 Uptown Sector Plan—undermines the City's position that it could have denied that proposed plan under the 1981 Uptown Sector Plan. Further, the discretion that the City possesses to deny site plans that are otherwise in compliance with existing zoning regulations is limited by the requirement that the City's decision pass muster under judicial review for administrative actions that are arbitrary and capricious or otherwise contrary to law. Existing zoning regulations and sector plans would mean little if the City had limitless discretion to deny proposed developments that were otherwise in compliance with those requirements. *See Smith*, 2005-NMSC-012, ¶ 33, 137 N.M. 280, 110 P.3d 496 ("Ad hoc, standardless regulation that depends on no more than a zoning official's discretion would seriously erode basic freedoms that inure to every property owner.").

{59} The record shows that the Opus site plan, though it needed some adjustments (adjustments that were in the process of being made at the time the City imposed the moratorium to consider the 1995 Uptown Sector Plan amendments), complied with the requirements of the 1981 Uptown Sector Plan and was no different from a number of projects that the City had previously allowed under that sector plan. *See Smith*, 2005-NMSC-012, ¶ 30, 137 N.M. 280, 110 P.3d 496 ("Courts generally show little deference to an agency's interpretation of its own statute when the interpretation is an unexplained reversal of a previous interpretation or consistent practice." (Quoted authority omitted.)); *High Ridge Hinkle Joint Venture*, 119 N.M. at 41, 888 P.2d at 487 (noting that the City Council "should not be permitted to achieve retroactivity through the back door by changing the meaning of an ordinance while leaving the language the same"). Because our Opinion has

now eliminated the basis for the Court of Appeals' reversal of ACP's takings claim, we remand the takings claim for the Court of Appeals to consider the other arguments raised by the City with respect to that claim.[8]

*CONCLUSION*

{60} We reverse the Court of Appeals on the first administrative appeal and affirm the district court on that matter. The case is remanded to the Court of Appeals to consider the City's remaining claims of error.

{61} *IT IS SO ORDERED.*

WE CONCUR: EDWARD L. CHÁVEZ, Chief Justice, PATRICIO M. SERNA and PETRA JIMENEZ MAES, Justices, and PAUL KENNEDY, J. Pro-Tem.

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[8] Of course, if the Court of Appeals finds for ACP on its § 1983 action and affirms the jury's award of damages on that claim, there will be no need to address the takings issue, as the takings verdict was an alternative to the due process verdict.

**APPENDIX C**

COURT OF APPEALS OF NEW MEXICO.

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Nos. 24,026, 24,027, 24,042.

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ALBUQUERQUE COMMONS PARTNERSHIP,
*Petitioner-Appellee,*

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
*Respondent-Appellant.*

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April 26, 2006.
Revised Dec. 19, 2006.
Certiorari Granted, No. 29,791, Nov. 29, 2006.

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OPINION

CASTILLO, *Judge.*

{1} On motion for rehearing, the opinion filed December 9, 2005, is withdrawn, and the following opinion is substituted in its place. Additionally, we append an order on rehearing, in which we address four issues argued in the motion for rehearing that were not developed in the original opinion, were not addressed, or need clarification. The motion is otherwise denied.

{2} This case is before us on the City Council of the City of Albuquerque's (City or City Council) appeal from a jury verdict and on writs of certiorari that we granted to review district court appeals of two administrative decisions, all relating to the City's 1995 amendment of the Uptown Sector Plan (95USP). The

district court determined that the amendment targeted the property of Albuquerque Commons Partnership (ACP) and resulted in a downzoning of that property. The district court ordered the City to consider ACP's development plan under the previous sector plan, the 1981 Uptown Sector Plan (81USP). Upon remand, the City considered the development plan under the 81USP and denied the development. ACP appealed that denial to the district court. The court determined that the City had not reviewed the development as ordered and concluded that the development had to be approved. In the meantime, ACP's claim for damages for violation of constitutional rights, resulting in a taking and violation of civil rights in connection with the 95USP, proceeded to a jury trial. The jury found for ACP and awarded damages of $8,349,095. We reverse the district court's initial conclusion regarding the 95USP. Because that conclusion formed the basis for the other two decisions, those decisions are likewise reversed.

## *I. BACKGROUND*

{3} The record in these consolidated cases is quite extensive and involves several thousand pages of record. With this in mind, we will summarize many of the basic facts in chronological order and then incorporate specific facts into the discussion of the issues as necessary.

### *A. Development of the 81USP*

{4} The City's Comprehensive Plan designated the Uptown Sector as one of several urban centers in the City. The Uptown Sector is located in the northeast section of Albuquerque, approximately 6.5 miles from the downtown area. It contains more than 2 million square feet of retail space, primarily in the two

regional malls, Winrock Center and Coronado Mall. In addition, the area contains 1.9 million square feet of office space, or 23 percent of the total office space in Albuquerque. The area provides the highest concentration of retail and office uses outside of downtown.

{5} An urban center is described as an area containing the highest densities and the tallest and most massive structures. It is intended to concentrate a wide range of community activities and intense land uses for greater efficiency, stability, image, and diversity and for a positive effect on the urban form, environmental quality, and the transportation network. Albuquerque Bernalillo County Comprehensive Plan (Comprehensive Plan) at 15 (1988, amended 1991). The goal of an urban center is "to create specially designed concentrations of high-density mixed land use and social/economic activities which reduce urban sprawl, auto travel needs, and service costs, and which enhance the urban experience." *Id.* at 69.

{6} In 1981, the City implemented the 81USP. It defined the area governed by the plan and set out the governing concepts for development in the area. Part of the plan dealt with traffic and transportation in the area, as well as specifically contemplating the construction of a loop road located in roughly the center of the sector. Excluding roads, the Uptown Sector covers approximately 460 acres. Under the 81USP, the majority of the Uptown Sector was zoned SU-3, the periphery was zoned SU-2, and the single-family homes along San Pedro Drive were zoned R-1 to protect the existing residential uses. These zoning classifications were not changed in the 95USP. *See* map of Uptown Sector Development Plan Parcel

Zoning (Appendix A) and map of Uptown Sector outlining inner core surrounded by Loop Road (Appendix B). SU-3 zoning provides suitable sites for high-intensity mixed uses-commercial, office, service, and residential. SU-2 provides suitable sites for a low-to medium-intensity mixture of office, service, institutional, and residential uses as a transition area between the core of the urban sector center and the surrounding low-density residential uses. The 81USP contained specific standards for site development plans in the SU-2 and SU-3 zones and required site development plan approval by the City Planner and the Environmental Planning Commission. The 81USP did not mandate development densities or limit the amount of retail use in a development and did not impose structured parking requirements. The 81USP did, however, repeatedly refer to pedestrian-friendly landscaping, open space, and building orientation within the center of the Uptown Sector, in accordance with the City's Comprehensive Plan. According to the Comprehensive Plan, Uptown is one of several urban centers; an urban center is defined as having a concentration of contiguous uses that include the highest densities and tallest and most massive buildings, providing a unique sense of place.

{7} From 1981 to 1988, there were minor amendments to the original 81USP, none of which affected the uses delineated in the original plan. Accordingly, we refer to the 1981 Uptown Sector Plan, as amended through 1988, as the 81USP. Review of the 81USP for content revision began in 1989; in March 1993, the revisions began in earnest. In March 1994, the first draft of the revisions to the 81USP was distributed to various agencies for comment.

*B. First Two Site Development Plans*

{8} ACP is a Texas general partnership whose principal partner is Albuquerque Uptown Partnership, another Texas general partnership. At all times material in this case, ACP was the leaseholder under a long-term ground lease with the Archdiocese of Santa Fe of the old St. Pius High School site, consisting of approximately 28 acres (28-acre parcel) located at the northeast corner of Louisiana Blvd. NE and Indian School Rd. NE, in the center of Albuquerque's Uptown Sector. The western 19.3 acres of the 28-acre parcel are located in the SU-3 zone, and the eastern 8.7 acres are located in the SU-2 zone. In 1987, ACP submitted a site development plan under the 81USP, consisting of a hotel, multistory office buildings, retail facilities, and a 7-acre arboretum. This proposed development included almost 1.3 million square feet in office space, 121,323 square feet dedicated to retail, and a 400-room hotel. The plan was approved by the City but was never built.

{9} The 28-acre parcel remained undeveloped until 1991, when ACP decided to sell its leasehold. ACP selected Opus Southwest Corporation (Opus) to assume development of the property. Opus proposed either to purchase or to lease the property if Opus could obtain approval of its site development plan. In June 1994, Opus submitted a site development plan for a 28-acre low-density "big box" retail shopping center. Because the site development plan included property in the SU-2 zone, Opus also requested a zone map amendment, as well as an amendment to the 81USP. The public strongly opposed the plan, and Opus withdrew it on August 31, 1994. The opposition was based on differing views of the type of development that was appropriate for the Uptown Sector:

the suburban nature of the Opus plan conflicted with the expectation of most of the surrounding property owners that development of undeveloped land in the center of the Uptown Sector would be urban in character. The opposition became public; the negative reaction of the surrounding property owners to the Opus site development plan was reported by at least one newspaper, and a number of letters criticizing the project were sent to the planning department, one of which was copied to the Mayor and councilors.

*C. Final Site Development Plan and Development of the 95USP*

{10} Soon after Opus withdrew its application, in mid-September 1994, the City passed Memorial M7-1994, requesting a comprehensive public review and revision to the 81USP. The City stated that it was desirous of fulfilling the vision of the plan, observed that the 81USP was in need of significant revision and strengthening, and requested that the planning department present its "plan-amendment recommendations and a record of the public review" of the 81USP to the City's Environmental Planning Commission (EPC) for consideration by the end of April 1995.

{11} On September 30, 1994, two weeks after passage of M7-1994, Opus submitted a second application, this time for development of a smaller, 17.9-acre low-density "big box" project. The project was to be located entirely in the SU-3 zone, so no amendments to the zoning map or sector plan were requested. *See* preliminary site plan (Appendix C).

{12} At this point, events follow two concurrent tracks: Opus focused its energy on obtaining site approval for the smaller development under an

unrevised 81USP, while the planning department was obtaining public input, arranging for studies to be conducted, scheduling public hearings, and working on revising the 81USP as per the terms of M7-1994. The following is a summary of these activities.

{13} A public workshop on Uptown Sector issues was presented for developers, landowners, businesses, and neighborhood leaders by the planning department in early November 1994; the department thus complied with the request for "comprehensive public review," as contained in M7-1994. The workshop was attended by about seventy-five people and covered numerous development issues, including mixed uses, evolving market demand and conditions, transportation, air-quality maintenance, and population trends, among others. The idea of identifying an intense urban core inside Loop Road was discussed, as was the use of a floor area ratio (FAR). "FAR" is defined as the leasable floor space divided by the site's square footage. Participants considered other related issues, such as balancing retail use, proposing internalized parking, encouraging evening activity, and improving transportation management. Information from this meeting was considered by the City in its revision of the 81USP.

{14} The Opus site plan had been originally set for a hearing in November before the City's EPC. Because Opus wanted to revise the site plan, based on agency and staff comments, Opus agreed to a deferral of that hearing to the January EPC meeting. Opus's revised site plan (Opus site plan) was referred to the EPC for review on January 1995. At the hearing on January 12, 1995, the EPC conducted a lengthy discussion regarding whether the Opus site

plan should be deferred, pending revision of the 81USP. The EPC ultimately decided to continue the hearing until the January 26, 1995, meeting. At this meeting, the EPC was informed that the City was considering a moratorium on development in the Uptown Sector, pending revision to the sector plan. Based on that information, the EPC deferred hearing Opus's development plan until February 9. The City Council was concerned that development in the Uptown Sector during the pending review and approval of amendments to the 81USP might be inconsistent or in conflict with the proposed revisions; therefore, on February 6, the City Council passed R-187. This resolution placed a four-month moratorium on all development within the Uptown Sector. On February 9, 1995, the EPC deferred hearing Opus's development plan until June, after the end of the moratorium. There was no appeal of the imposition of the moratorium.

{15} In February 1995, the planning department used a fast-track schedule with specific deadlines to prepare information necessary to evaluate proposed revisions to the 81USP. This information included a traffic impact analysis, an air quality and building intensity analysis, and a travel demand management scheme. By March 2, 1995, the revised plan was distributed for review. The focus of the revised plan was to quantify the policy set forth in the 81USP so that a true urban center would be sure to result. The amendments to which ACP objected were related to the additional regulations for an area inside the Loop Road, referred to as an intense urban core (intense core). Although the zoning designation remained SU-3, development in the intense core would require a minimum FAR of .7 and a maximum FAR of 1.5. A FAR of .7 requires that the leasable floor space be at

least 70 percent of the site's total square footage. A high FAR requires building up with very little parking space. Therefore, development would have to be predominantly office or other high-density use, with only specialty retail and commercial on the ground floor. All parking would be required to be in structures, except for a small number of spaces serving the ground-level establishments.

{16} The proposed revisions established a minimum FAR of .3 outside the intense core and a maximum of 1.0, thus allowing shopping centers and other retail uses. The amendments also required a Transportation Management Organization of Uptown, by which employers were to implement strategies to reduce single-occupant car trips to the area. Also included were recommendations regarding making the area more pedestrian friendly. The Albuquerque planning department made these recommendations on the bases that development in the area was becoming suburban and that the 81USP needed quantification in order for the City to maintain the policy objectives in urban areas of intense mixed use.

{17} The amendments were set for a series of public hearings before the EPC, the Land Use Planning and Zoning Committee (LUPZ), and the City Council. Through all of the public hearings, ACP and Opus were vocal and vehement in their objection to the amendments, which they argued effected a downzoning of their property. The public, representatives of neighborhood associations, and others provided testimony for and against all or part of the proposed revisions. Typically, the public viewed the proposed revisions to the 81USP as a way to "create a new sense of place, and protect [their] neighborhood[s] from suburban sprawl." One proponent was con-

cerned about the suburban sprawl to be created by the type of project proposed by Opus, which was described as "a [nineteen-]acre site, [fifteen] of [which] will be parking." Generally, the neighborhood associations urged a follow-through with the vision of Uptown as a true urban center, and they opined that this would be the long-term solution to transportation and air quality concerns.

{18} The first public hearing on the proposed revisions was held on April 13, 1995, before the EPC. After the staff presentation, the EPC heard comments from proponents and opponents of the proposal. On May 10, 1995, the LUPZ met and took testimony both from the planning department and the public. On May 24, 1995, a joint meeting of the EPC and the LUPZ was held. At that time, traffic, transportation, and air quality studies were reported. Issues that had been raised by the public at the April EPC hearing and the May 10 LUPZ meeting were addressed by a supplemental staff report presented at the joint meeting.

{19} At the conclusion of the joint meeting, the EPC continued with its meeting and voted 5-3 to recommend against the amendments. In the notification of its decision to LUPZ, the EPC found that the air pollution problem in the Uptown area would not be significantly affected by the land uses advocated, especially without a citywide traffic management plan. It also pointed out that there was testimony from developers suggesting that the FAR minimums and maximums would make development uneconomical, as evidenced by development in the downtown urban sector with similar FARs. Finally, the EPC found that the proposed amendment to the 81USP did not comply with Resolution 270-1980,

which sets forth certain requirements that must be met in cases of zone changes. The text of this resolution is contained in paragraph 64 herein. The EPC agreed that the sector plan needed revising but stated that the revisions proposed were unsatisfactory.

{20} The LUPZ met on May 30, 1995, and continued discussion on the amendments to the plan. The testimony at this hearing specifically addressed the findings on which the EPC based its recommendation not to adopt the revised plan. As to air pollution, a planner with the Environmental Health Division addressed the differences between the Parson's air quality study done for the City and the analysis of the data by JHK & Associates (JHK) that was performed for ACP. In addressing JHK's position that there was no meaningful difference in air quality between high-density office use and retail, the planner explained that the JHK conclusion was based on selected data only and that when all the data are used, mixed uses, together with any amount of transportation management strategies, will result in fewer exceedances of the carbon monoxide standards.

{21} Also at this meeting, there was testimony from three people with experience in the real estate or financial field, who provided information regarding office vacancy rates in Uptown and who were of the opinion that the vacant land in the intense core could develop under the 95USP. One of the witnesses represented an owner of vacant land in the intense core.

{22} As to the need to follow the requirements of Resolution 270-1980, the city attorney explained that in his opinion, the changes to the sector plan were not map changes and that the resolution therefore did not apply. At the close of the testimony, one of the

councilors observed that the problems inherent in the findings of the EPC had been "significantly addressed" during the meeting of the LUPZ. At the conclusion of the LUPZ hearing, the committee voted to send the revised sector plan on to the full City Council.

{23} The City Council met on June 5, 1995, to hear the matter. At that time, a number of amendments were proposed that had apparently been the result of negotiation among councilors, their constituents in the neighborhoods surrounding the Uptown Sector, and Uptown Sector businesses. Because the public had not been given the amendments prior to the meeting and was unprepared to discuss the amendments, the City Council deferred final hearing on the matter for about two weeks.

{24} On June 19, 1995, after adoption of several amendments to the revised sector plan and extensive argument both for and against the plan, the City Council voted 7-0 in favor of the revisions to the 81USP. In its resolution adopting the 95USP (Resolution 94-1995), the City Council made a number of findings, including that the plan's policy objectives needed to be quantitatively defined. It found that Uptown, as an urban center, affects the entire City and that Uptown's land use, transportation, and development have an impact on the safety and air quality of the entire metropolitan area.

{25} On July 6, 1995, the EPC voted to defer indefinitely Opus's site plan because it did not comply with the 95USP. Thereafter, ACP filed a petition in district court for review of the approval and adoption of the 95USP. ACP's complaint in district court sought review of the adoption of the 95USP and review of the City's refusal to hear the Opus site plan under

the 81USP. That complaint was later amended to include claims for damages for violation of constitutional rights, resulting in a taking of property and violation of civil rights. The district court conducted the administrative review of the adoption of the 95USP first and, for the reasons detailed in paragraph 32 herein, concluded that the intense core provisions of the 95USP could not be applied to the Opus site plan. The district court therefore remanded the matter to the City to consider the Opus site plan under the 81USP, the previous sector plan.

{26} The EPC heard the plan in November 1999 and denied it on the basis that it did not create the type of urban place that the master plan had intended. ACP appealed to the City Council, which agreed with the EPC and voted to deny the development. An appeal to district court resulted in a determination that the site plan did in fact comply with the 81USP, and the district court ordered that the plan be approved.

{27} The City filed a petition for writ of certiorari from that administrative decision. We denied the writ, based on our determination that the entire case had not yet been disposed of and that the appeal was premature. *Albuquerque Commons P'ship v. City of Albuquerque*, 2003-NMCA-022, ¶ 1, 133 N.M. 226, 62 P.3d 317.

{28} In February 2003, a jury trial was conducted on ACP's claims of constitutional taking and violation of due process. The claims were based on the City's adoption of the 95USP and its application to ACP's property. The jury was instructed that the law of the case was that ACP's property had been downzoned and that ACP was entitled to a quasi-judicial hearing before the property was downzoned. Finding that

ACP's due process rights were violated, the jury awarded damages.

{29} After judgment on the verdict, the City filed two petitions for writ of certiorari with regard to the two administrative decisions on the adoption and application of the 95USP. The City also filed a notice of appeal from the jury verdict. All three cases are consolidated.

## *II. DISCUSSION*

{30} We begin with the review of the district court's order as it relates to the City's enactment of the 95USP.

### *A. Standard of Review for Administrative Review*

{31} This Court reviews a district court's decision in an administrative appeal under an administrative standard of review. *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-010, ¶ 10, 135 N.M. 30, 84 P.3d 78. In so doing, "[w]e 'conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal.'" *Id.* (quoting *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806). "The district court may reverse an administrative decision only if it determines that the administrative entity, here the City, acted fraudulently, arbitrarily, or capriciously; if the decision was not supported by substantial evidence in the whole record; or if the City did not act in accordance with the law." *Gallup Westside Dev., LLC*, 2004-NMCA-010, ¶ 10, 135 N.M. 30, 84 P.3d 78. A reviewing court may not substitute its judgment for that of the City. *Id.* ¶ 11. In making our determination, we independently review only the record before

the district court regarding the City Council's adoption of the 95USP.

*B. Decision of the District Court Regarding the 95USP*

{32} On June 17, 1998, the district court prepared a letter decision with a detailed explanation of the decision on the various issues presented, including the adoption of the 95USP. The court entered its order (Order) on July 23, 1999, together with findings of fact and conclusions of law relating to the Order. Essentially, the district court determined that the 95USP created a new zone—the intense core—and that the creation of this new zone amounted to a downzoning of ACP's property. The district court further concluded that the downzoning was contrary to the *Miller* rule. *Miller v. City of Albuquerque*, 89 N.M. 503, 505, 554 P.2d 665, 667 (1976) (requiring evidence of a change or a mistake before downzoning property). The court also determined that the City had violated Resolution 270-1980 and that the zoning action was a quasi-judicial act. Based on these conclusions, the district court prohibited the City from applying the intense core provisions of the 95USP to the Opus site plan application.

{33} Below, we discuss (1) quasi-judicial versus legislative action, (2) text amendments and rezoning, (3) uniformity, (4) Resolution 270-1980, (5) downzoning, and (6) the "change or mistake" rule. Before we address these issues, however, it is important to examine the basic way the district court viewed this case and why that approach was inconsistent with the applicable standard of review, thereby leading to the errors we hold are present.

{34} In the decision letter, the district court pointed out that there are two completely different views of this case. One "is the story of a very careful, thorough, inclusive process of developing creative legislation to amend the Sector Development Plan of a critical section of the city." The other involves the placing of the burden of fulfilling a vision of Uptown on a single property owner. The district court concluded that this case was the second situation. Our review of the record shows otherwise.

{35} Under whole record review, the district court may not substitute its judgment for that of the agency—the City in this case—and must evaluate whether the record supports the result reached, not whether a different result could have been reached. *See, e.g., Zamora v. Vill. of Ruidoso Downs*, 120 N.M. 778, 784, 907 P.2d 182, 188 (1995); *Hernandez v. Mead Foods, Inc.*, 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct.App.1986), *limited on other grounds, Graham v. Presbyterian Hosp. Ctr.*, 104 N.M. 490, 491-92, 723 P.2d 259, 260-61 (Ct.App.1986). If there is evidence in the record to support the result reached by the agency, the district court is to affirm, even if it would have found the facts differently or reached a different result had the court been the decision maker in the first instance. *State v. Seal*, 75 N.M. 608, 609-10, 409 P.2d 128, 129 (1965). In this case, the district court recognized the evidence supporting the conclusion that the City carefully considered the amendments to the sector plan in a critical area of the City; however, it appears the district court directed its attention to the effect of the City's decision on ACP's property and, in doing so, failed to evaluate the evidence supporting the City's decision. Because the record contains evidence supporting the decision of the City, this, among other reasons, forms the basis for our

conclusion that the City's action was legislative in nature and that no downzoning occurred. As we consider the parties' arguments, we will detail, as necessary, the evidence presented in support of the City's action and evaluate that evidence in light of the legal issues presented.

*C. Issues*

*1. Quasi-judicial Versus Legislative Action*

{36} The nature of the City's action is pivotal in this case. Accordingly, we begin our discussion of the issues by evaluating whether the adoption of the 95USP was a quasi-judicial or legislative action. The district court found and concluded that the most burdensome of the new requirements in the 95USP fell on ACP and on two other parcels; that the creation of an intense core constituted a downzoning of ACP's property; that the City treated the amendment as a legislative action and not a zone change of a small area, requiring quasi-judicial procedures to be followed; and that ACP was entitled to, and did not receive, quasi-judicial review of its objections to the downzoning. We have explained the basic differences between legislative action and quasi-judicial action in *KOB-TV, L.L.C. v. City of Albuquerque*, 2005-NMCA-049, ¶¶ 19-20, 137 N.M. 388, 111 P.3d 708. In summary, legislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in

question. *Id.* Generally, legislative actions result in the formulation of a general rule of policy, and quasi-judicial actions result in the application of a general rule of policy. Consequently, application of a general rule to a particular piece of property, as occurred in the rezoning of a single property in *West Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, ¶ 11, 122 N.M. 495, 927 P.2d 529, *superceded by statute on other grounds, as stated in C.F.T. Development, LLC v. Board of County Commissioners*, 2001-NMCA-069, ¶ 14, 130 N.M. 775, 32 P.3d 784, is quasi-judicial. Often, quasi-judicial actions begin with the filing of an application by an individual property owner, who requests some type of relief that is authorized when certain facts are present. Examples include matters like approval of the property owner's proposal to build a gas station in a parking lot, applications for conditional use permits, and petitions for variances. *See, e.g., Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 18, 137 N.M. 152, 108 P.3d 558 (holding that the city's decision to approve a gasoline station was quasi-judicial in nature); *State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct.App.1989) (deciding that hearings before a zoning hearing examiner and the Environmental Planning Commission regarding an application for conditional use permits were quasi-judicial); *Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 95 N.M. 401, 402, 622 P.2d 709, 710 (Ct.App.1980) (determining that a public hearing to consider a petition for a variance in air-quality regulation was quasi-judicial).

{37} Here, the district court found that the vacant property remaining to be developed in the intense core was controlled by only three parties. However, the fact that the vacant property remaining to be

developed here belongs to a limited number of parties does not mean that the zoning action was necessarily quasi-judicial in nature. "'[T]he central focus, in our view, should be on the nature of the governmental decision and the process by which that decision is reached.'" *Jafay v. Bd. of County Comm'rs*, 848 P.2d 892, 898 (Colo.1993) (en banc) (quoting *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 626 (Colo.1988) (emphasis omitted)). *Jafay* analyzed the zoning action to see if it applied to only a single site or whether it established an areawide policy regarding future urban growth. 848 P.2d at 898. If the zoning decision has general application and was drawn to apply in the same way currently and in the future to all similarly situated properties, it is legislative. *See Rockville Fuel & Feed Co. v. City of Gaithersburg*, 266 Md. 117, 291 A.2d 672, 680 (1972). As we stated in *KOB-TV*, "a legislative decision may appear adjudicatory when parties focus on the effect of the particular decision on individual rights. However, policy decisions generally begin with the consideration and balancing of individual rights." 2005-NMCA-049, ¶ 22, 137 N.M. 388, 111 P.3d 708 (internal quotation marks and citation omitted).

{38} First, we observe, as did the district court, that the burden of the restrictions does not fall solely on ACP. It is only that ACP's property is vacant and yet to be developed. Two other vacant properties are also subject to the restrictions, and there are other properties within the intense core that, in large part, already comply with the density and parking restrictions. For example, the Park Square block overall has a FAR of about 1.15 with a mixture of office, specialty retail, and commercial. Moreover, contrary to ACP's argument, any redevelopment that occurs within the core must abide by these

restrictions. ACP is not prevented from developing its property. It must simply now abide by the density and parking restrictions of the intense core. Zoning as "governmental regulation of the uses of land and buildings" always affects a property owner's ability to use his property as he sees fit. *Miller*, 89 N.M. at 505, 554 P.2d at 667 (internal quotation marks and citation omitted). The fact that he cannot use it as he wants is simply the price of living in a modern community. *Id.* (recognizing that incidental economic loss resulting from zoning restrictions is "merely the price of living in a modern enlightened and progressive community" (internal quotation marks and citation omitted)).

{39} Second, the fact that a particular party's proposed development or a particular parcel is in the mind of the zoning authority when it takes action does not change the nature of the decision. *KOB-TV*, 2005-NMCA-049, ¶ 24, 137 N.M. 388, 111 P.3d 708. ACP argues that its property was targeted in the revisions to the sector plan. We agree that ACP's proposed big-box development did influence the timing of the amendments to the sector plan. This is not determinative. As we stated in *KOB-TV*, "the fact that a zoning authority considers a particular party's proposed development or a particular parcel when it takes actions does not change the nature of the decision." *Id.* (citing *Atlanta Bio-Med, Inc. v. DeKalb County*, 261 Ga. 594, 408 S.E.2d 100, 102 (1991)). Although there was evidence that community concerns may have influenced the City's actions, the record is clear that legitimate concerns about the development of the Uptown Sector formed a basis for the revision. We cannot say, and the district court did not hold, that the City's decision in this case to adopt the 95USP was based solely on public outcry or a

desire to prevent ACP from developing its property. Rather, there is much in the record supporting the City's position that the decision was premised on a desire to clarify and strengthen the 81USP. Indeed, the very terms of the adopting resolution outline the various purposes for which it was enacted. These purposes include strengthening the sector plan, quantitatively defining the Comprehensive Plan's policy objectives, and maintaining the area as an urban center. Revisions to the 81USP were made in order to achieve these purposes. We reverse the district court and hold that the adoption of the 95USP was a legislative act.

*2. Text Amendment and Rezoning*

{40} Another question here is the characterization of the City's zoning action. In concluding that the creation of the intense urban core amounted to an illegal downzoning, the district court found that the 95USP created a "new zone." The City maintains, and has from the beginning, that the adoption of the 95USP was not a rezoning of ACP's property but was a text amendment to the zoning code, which strengthened the existing regulations in order to assure development of an urban center, as already required by the 81USP and Comprehensive Plan. ACP disagrees. It points to the differences in allowed uses between the intense core and the area outside the intense core, both of which are in the SU-3 zone, and argues that these changes are so drastic that they essentially effect a rezoning from unrestricted retail to predominately office. ACP compares the type of projects approved under the 81USP with those that would be allowed under the 95USP and concludes that the 95USP does not strengthen the existing regulations but rather severely restricts formerly

approved uses. Last, ACP contends that the district court correctly considered the creation of the intense core zone a fundamental change in the uses of ACP's land and that this constitutes a zone change, regardless of the City's characterization of the amendment.

{41} We address ACP's "fundamental change" argument first. In *Nesbit v. City of Albuquerque*, 91 N.M. 455, 458, 575 P.2d 1340, 1343 (1977), we held that a proposed amendment to a development plan increasing units from 83 to 287 constituted a fundamental change in a zoning restriction and thus required notice and public hearing. Zoning law regarding "fundamental change" relates to the necessity for notice and hearing on the items delineated in the notice. *Id.* There is no contention here that the notice was inadequate. The law regarding "fundamental change" does not set forth the differences between a text amendment and rezoning. For this distinction, we look elsewhere.

{42} We now turn to the characterization of the City's action in adopting the 95USP. We observe that the parties and the district court used the terms "rezoning" and "zone change" to mean the creation of a new zoning district. A zoning ordinance generally consists of two parts: (1) the text setting forth procedures and regulations relating to the various districts and (2) the map showing where such districts are located. 1 Norman Williams, Jr., and John M. Taylor, *American Land Planning Law* § 17:4, at 464 (rev. ed.2003). After a zoning ordinance is enacted, changes are made by zoning amendments. Ziegler describes all zoning amendments as "rezonings" and divides them into three main categories: map amendments, text amendments, and amendments to

procedures. 3 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* (*Rathkopf's* ) §§ 38:2 to 38:4, at 38-3 to -4 (2005). The most common type of rezoning is a zoning map change that involves the zoning district reclassification of a particular tract of land by alteration of the official zoning map. 3 *Rathkopf's, supra* § 38:2, at 38-3. Then there is the change to a zoning text or code that specifies the allowed or permitted uses within a particular existing zoning district classification. 3 *Rathkopf's, supra* § 38:3, at 38-3 to -4. Zoning text amendments do not affect the zoning district classification, but rather change the allowed or permitted uses within a particular zoning district. *Id.* A zoning text amendment is exemplified by an ordinance that changes the use restrictions applicable to a particular zone. 6 Patrick J. Rohan, *Zoning and Land Use Controls* § 39.02[1], at 39-2 (1992). The last type of rezoning, which is not at issue in this case, involves changes to specific procedural requirements under a zoning ordinance. 3 *Rathkopf's, supra* § 38:4, at 38-4.

{43} Based on the above, the critical question is not whether there was a "rezoning," but rather whether the City's amendment to its zoning code was accomplished by map amendment or by text amendment.

{44} New Mexico law recognizes that a text amendment is different from a zone reclassification; the general term "rezoning" seems to refer to a zone reclassification by map amendment, much as Ziegler does later in his treatise. 3 *Rathkopf's, supra* § 39:2, at 39-2 to -3. We base this on two cases: *KOB-TV*, 2005-NMCA-049, ¶¶ 8, 27, 137 N.M. 388, 111 P.3d 708, and *Mandel v. City of Santa Fe*, 119 N.M. 685, 894 P.2d 1041 (Ct.App.1995). In *KOB-TV*, the television station (KOB) had been legally operating a

helicopter from its studios, located on property zoned SU-2/O-1. 2005-NMCA-049, ¶¶ 2, 3, 137 N.M. 388, 111 P.3d 708. In 1997, the City issued to KOB a building permit for construction of a helipad on the property, after which KOB began remodeling its facility to include the helipad and purchased a $1 million helicopter. *Id.* ¶ 3. Thereafter, the City adopted an amendment to its zoning code restricting the location and operation of all helicopters, except medical and law enforcement helicopters, to SU-1 zones. *Id.* ¶ 23. Based on the amendment, the City revoked the permit allowing KOB's helipad use. *Id.* ¶ 9. We characterized the ordinance as a text amendment. *Id.* ¶ 8. There was no change in the zoning of KOB's property, but the zoning amendment affected the uses allowed on the property by eliminating helipad use. *Id.* ¶ 27. Similarly to the amendment in *KOB-TV*, the revisions to the 81USP did not change the zoning classification of ACP's property but arguably affected the uses to which ACP could put the property.

{45} In *Mandel*, the City of Santa Fe amended the city zoning code to permit the Historic Design Review Board to impose height restrictions in historic districts (Height Amendment). 119 N.M. at 686, 894 P.2d at 1042. The Height Amendment went into effect while Mandel's development was being considered by city authorities, and his proposal was ultimately denied on the basis of inappropriate second-story structures, as prohibited by the Height Amendment. *Id.* at 686-87, 894 P.2d at 1042-43. One of Mandel's arguments objecting to the imposition of the height restrictions was that if the underlying zoning permits a certain height, any lessening of that height is in effect a rezone. *Id.* at 688, 894 P.2d at 1044. We disagreed. *Id.* We noted that the zoning of

Mandel's property remained the same but that its location in a historic district made the property subject to more restrictive requirements. *Id.* Imposition of height restrictions "does not mean the property has been rezoned." *Id.*

{46} ACP argues that passage of the 95USP was tantamount to enacting an amendment to the zoning map because the 95USP effectively created two zones: the intense core and outside the intense core. We are not persuaded. As in *KOB-TV* and *Mandel*, the zoning in the Uptown Sector remains SU-3, which allows for the high-intensity mixture of commercial, residential, and retail uses encouraged in an urban center. Any development in the SU-3 zone requires approval of a site development plan. Although the zoning remained the same, the 95USP denoted different uses, building densities, and parking limitations in the intense core and outside the intense core. We view the different uses, building densities, and parking restrictions in the intense core of the Uptown Sector no differently than we viewed the historic overlay in *Mandel*.

{47} ACP also contends that the City's argument that the 95USP was merely a "text amendment" is inconsistent with *West Old Town Neighborhood Ass'n*. We disagree. *West Old Town Neighborhood Ass'n* dealt with a zoning classification in a sector plan covering property in the greater Old Town area, both inside and outside the city boundaries. 1996-NMCA-107, ¶ 4, 122 N.M. 495, 927 P.2d 529. Rejecting the City's argument that the zoning classification in the sector plan was merely advisory as to land outside the city limits, we held that because the sector plan established RA-1 zoning for "the area it covered, the change to SU-1 was rezoning." *Id.* ¶ 18. Unlike the

change to the underlying zoning classification in the Old Town sector plan, the 95USP does not change any of the zoning classifications established in the 81USP. Consequently, ACP's argument fails.

{48} The 95USP amended the City's zoning code. While we agree that this was a rezoning, *see* 3 *Rathkopf's, supra* § 38:3, at 38-3 to -4, the rezoning was accomplished by text amendment, not map amendment. This conclusion relates to our evaluation of the following issues: Resolution 270-1980, downzoning, and application of the "change or mistake" rule.

*3. Uniformity*

{49} ACP contends that the City attempted to avoid the rezoning rules by creating a new SU-3 intense core zone in the guise of revising the 81USP. ACP argues that the regulations of the intense core were not applicable citywide or even to all SU-3 designated property in the 81USP and thus violated the requirement of uniformity, as specified by NMSA 1978, § 3-21-1(B)(2) (1995). Section 3-21-1(B)(2) allows a municipal zoning authority to "regulate or restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land in each district. All such regulations shall be uniform for each class or kind of buildings within each district, but regulation in one district may differ from regulation in another district." So the question becomes whether all restrictions within one zone must be uniform.

*a. History of Zoning*

{50} To answer this question we look to the history of zoning as it applies to sector plans. Zoning is defined as "governmental regulation of the uses of land and buildings according to districts or zones."

*Miller*, 89 N.M. at 505, 554 P.2d at 667 (internal quotation marks and citation omitted). "When used to promote the public interest, it is justified and has been upheld as a legitimate exercise of the police power." *Id.* (citing *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)). From the *Euclid* case comes the term "Euclidean" zoning which "describes the early zoning concept of separating incompatible land uses through the establishment of fixed legislative rules that would be largely self-administering." 1 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 1:5, at 1-21 (2005). Generally, by means of Euclidean zoning, a municipality divides an area geographically into particular use districts and specifies certain uses for each district. Each district, or zone, is then dedicated to a particular purpose—residential, commercial, or industrial—and each zone will appear on the municipality's official zoning map. *Id.* § 1:3, at 1-18. "Euclidean zoning . . . exists more in form than in fact in many communities today. The modern trend clearly is towards greater flexibility and discretionary review of proposed individual uses." *Id.* § 1:5, at 1-24 (footnote omitted). This flexibility is apparent in the Comprehensive Plan and the 81USP, which contemplated an urban center, zoned the bulk of the property in Uptown as SU-3, and required site development approval to accomplish the goals of the plans. As observed in *Rathkopf's*,

> [o]ver the years, . . . many communities . . . have come to recognize the potential benefits of providing for mixed-use development in selected areas. . . . These districts usually provide a set of development, performance and design standards that are specifically tailored to a particular area in order to deal with problems of compatibility

> and to implement a community's predominant use and density plan for that area. Mixed-use districts often are utilized near downtown business areas [and] in uptown business centers....

*Id.* § 11:12, at 11-40 to -41 (footnote omitted).

{51} As to the uniformity requirement in these mixed-use districts, "[s]o long as zoning classifications and restrictions do not arbitrarily discriminate between owners or lands similarly situated, the 'uniformity' requirement in zoning is unlikely to be held to be violated." *Id.* § 11:16, at 11-53. "Generally the uniformity requirement has not significantly limited the modern trend toward more intensive and site [-] specific regulation of land development through special zoning districts and discretionary development review." *Id.* at 11-53 to -54.

*b. Uniformity Concept*

{52} The uniformity concept is discussed at length in *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182, 194-95 (1989), where the court concluded that the uniformity requirement does not prohibit different classifications within a district, so long as they are reasonable and based on the public policy to be served. The court relied on *Charter Township of Oshtemo v. Central Advertising Co.*, 125 Mich.App. 538, 336 N.W.2d 823, 826 (1983) (explaining that the township rural zoning act, which provides that zoning ordinance provisions be uniform for each class of land, buildings, dwellings, and structures throughout the district, is subject to the "reasonableness" exception, allowing reasonable restrictions based upon different conditions within the zone), and *Quinton v. Edison Park Development Corp.*, 59 N.J. 571, 285 A.2d 5, 9-10 (1971) (recognizing that the statute that requires zoning regulations be uniform for each class

or kind of buildings or other structures, as well as for uses of land throughout each district, does not prohibit classifications within a district, as long as they are reasonable). In *Charter Township of Oshtemo*, the Michigan court of appeals held that allowing billboards only in those parts of "C" zoned areas within 150 feet of an interstate highway and its business route was reasonable, based on the type of sign and driving patterns. 336 N.W.2d at 826. In *Quinton*, the New Jersey supreme court upheld a 100-foot buffer strip between adjacent business and residential use when the business is located on a 10- or more acre tract, so as to protect adjacent residential areas from noises, lights, and other disturbances that accompany large commercial developments, even when the residential area to be protected is in an adjoining municipality. 285 A.2d at 6, 10. In both cases, the reviewing courts evaluated the restriction in light of its purpose and recognized a reasonableness exception. We see no reason why such an exception should not apply here. *See* 1 Kenneth H. Young, *Anderson's American Law of Zoning* § 5.25, at 454-55 (4th ed.1996). The uniformity requirement does not prohibit a different classification within a district, as long as it is reasonable and based upon the public policy to be served. *See also Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483, 501-02 (1977) (finding no violation of the uniformity provision in requiring a certain portion of the FAR to be designated for parking in one business district but not in another when both business districts are located in the same zoning district); *Rumson Estates, Inc. v. Mayor of Fair Haven*, 177 N.J. 338, 828 A.2d 317, 329-30 (2003) (deciding that the uniformity requirement is not absolute and that as long as similarly situated property is treated the same, dif-

ferent conditions in same zoning district, such as special requirements for single-family dwellings located on steep slopes, would permit different regulations).

{53} ACP relies on *Smith v. Board of County Commissioners*, 2005-NMSC-012, ¶ 33, 137 N.M. 280, 110 P.3d 496, for the propositions that regulations restricting the use of land must be clear and fair and must apply equally to all and that "standard-less regulation that depends on no more than a zoning official's discretion would seriously erode basic freedoms that inure to every property owner." ACP argues that the restrictions imposed for the property located in the intense core violated this basic tenet and were unreasonable and that they therefore violated the uniformity requirement.

{54} We fully agree with the proposition in *Smith*, but we disagree with ACP's assertion that the 95USP violates the proposition. As we have stated before, the 95USP quantified the direction already provided in the 81USP. The 81USP specifically states that the SU-3 zone in the Uptown Sector "provides suitable sites for a high intensity mixture of commercial, office, service, institutional, and residential uses." The permissive uses set out in the plan were all "subject to site development plan approval." Specifying FARs, structures for parking, and mixed use in the center of the Uptown Sector achieves the basic premise set out in the 81USP. Just because a use is permitted does not mean that a project with that use will be approved. *See W. Bluff Neighborhood Ass'n v. City of Albuquerque*, 2002-NMCA-075, ¶ 3, 132 N.M. 433, 50 P.3d 182 (explaining that the original site plan for a 65-acre development approved by the EPC was ultimately rejected by the city council), *overruled*

*in part on other grounds, Rio Grande*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. Numerous factors must be considered in order to have a site plan approved. *W. Bluff*, 2002-NMCA-075, ¶ 33, 132 N.M. 433, 50 P.3d 182 ("In the process of considering a proposed site plan, a municipality must apply its expertise in weighing and balancing many factors and policy concerns, a practice which necessitates an exercise of discretion."). The City exercised the required discretion in evaluating ACP's site plan, and the plan was properly rejected under both the 81USP and the 95USP.

*c. Rationales*

{55} In this case, there are at least two rationales for more intense building requirements in the inner core: (1) to encourage intense urban uses in the Uptown Center, as envisioned by the 81USP and the Comprehensive Plan, and (2) to improve air quality. In Resolution 94-1995, the City found that the Uptown area is designated by the Comprehensive Plan as one of five urban centers and one of only three that are zoned SU-3, as permitted by the Code. The City also found that the revisions to the 81USP were "in response to current needs and trends in the area" and were needed to "strengthen its land use, transportation, [and] environmental and urban design components and to quantitatively define the Plan's policy objectives."

*i. Comprehensive Plan and Code Provisions*

{56} The Comprehensive Plan identified several issues associated with implementing the urban center concept contained in the 1975 Comprehensive Plan, a concept by which sector plans would delineate "clear, uniform design standards that would sketch each center's unique character, and their relationship to

surrounding neighborhoods." The Comprehensive Plan noted that land use, zoning, and transportation decisions made between 1975 and 1986 had undermined the effective implementation of the concept but observed that with rigorous support and effort to contain intense uses in designated urban center areas, the concept might succeed. The Council's finding was based in part on this language in the Comprehensive Plan.

{57} At the May 10 meeting of the LUPZ, Joel Water, the Albuquerque planning manager, explained that the Uptown Center was envisioned as having mixed urban uses with the highest building masses in the city. The idea of an intense core inside the Loop Road to ensure the urban nature of the area was discussed at the public workshop held on November 9, 1994. This idea was incorporated into the proposed revisions to the 81USP. From the review of the comments at the several meetings at which the revisions were discussed, it becomes clear that the revisions were designed to strengthen the urban nature of the area and prevent suburban sprawl. Requiring more intense uses in the very center of the Uptown Sector is a reasonable approach to meeting the definitional requirements of an Urban Center as defined in the Comprehensive Plan as it existed prior to the events in this case.

{58} As we have previously recognized in *West Bluff*, 2002-NMCA-075, ¶¶ 23-24, 132 N.M. 433, 50 P.3d 182, the Code has a three-tiered approach to land use. The City's master plan consists of a hierarchy of increasingly specific planning documents. *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. The Rank One Plan is the "basic long range city policy for the development and conservation of

the entire metropolitan area." Code § 14-13-1-2(A); *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. Rank Two Plans are Facility or Area Plans that typically cover "15 or more square miles, and specify important development standards." Code § 14-13-1-2(B); *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. Rank Three Plans, or Sector Plans, cover a much smaller area with the greatest level of specificity. Code § 14-13-1-2; *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. Sector Plans may "create special zoning regulations for the area covered, and may also specify other fairly detailed development parameters." Code § 14-13-1-2(C)(1); *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. The Code defines "Sector Development Plan" as follows:

> A plan, at a scale of 1 inch to 200 feet, or 1 inch to 400 feet, which covers a large area satisfactory to the Planning Commission, and specifies standards for the area's and sub-area's character, allowed uses, structure height, and dwellings per acre; the plan may specify lot coverage, floor area ratio, major landscaping features, building massing, flood water management, parking, signs, provisions for maximum feasible solar access, provisions for transportation, and other such features. Such plan constitutes a detailed part of the master plan and must be essentially consistent with the more general elements of the master plan, the Albuquerque/Bernalillo County Comprehensive Plan.

Code § 14-16-1-5.

{59} Section 14-16-2-24 of the Code governs the SU-3 Special Center Zone. An SU-3 zone is described as a zone that "allows a variety of uses controlled by a

plan which tailors development to an Urban Center; these include centers of employment, institutional uses, commerce, and high density dwelling." Code § 14-16-2-24. Unlike for other zones, the text of the SU-3 zone does not list permitted uses, prohibited uses, conditional uses, or the like. Instead, the text allows any use "consistent with the master plan and specified by a duly adopted Sector Development Plan," with the provision that "[s]pecifications contained in the Sector Development Plan shall control." Code § 14-16-2-24(A). An SU-3 zone was designed to be flexible; therefore, the creation of two areas, one requiring more intense uses than the surrounding area, is not inconsistent with this zone description. Thus, it was completely consistent with the Comprehensive Plan that development of suburban-type commercial establishments, such as Macaroni's, Toys-R-Us, and similar businesses, was permitted in the perimeter of the Uptown Sector; however, when such development was proposed for the center of the Sector, the City, again consistently with the Comprehensive Plan, disapproved the site development plan.

*ii. Environmental Reasons*

{60} We also look to the environmental reasons relating to the creation of the intense core. In Resolution 94-1995, the resolution adopting the 95USP, the City found that the sector plan affects the entire city and that the land use and transportation planning and development will affect the safety and air-quality management of the Albuquerque metropolitan area. With regard to the 95USP's effect on air quality, the district court made the following findings: (1) that the air-quality impact assessment showed no significant differences in air pollution between the current retail trends and the proposed

uses under the Revised Plan, (2) that the City's air-quality and traffic analysis showed that the only significant impact on air pollution would come from imposing stringent traffic-demand management measures on a regionwide basis, and (3) that no such regionwide measures were included in the Revised Plan. Our review of the whole record shows otherwise.

{61} At the joint meeting of the EPC and the LUPZ on May 24, 1995, the air pollution control division (division) planner reported on the air-quality impact analyses that were prepared for the 95USP. Based on evaluation of the report, the planner supported the mixed-use concept in the sector plan and felt that such land use would be the most beneficial for air quality. While the record does reflect a general assessment that there were no significant differences in air quality between the retail trends in effect at the time and the proposed sector plan uses, the planner explained that in terms of pollution levels, however, the proposed sector plan high-density uses would be "equal to or better than retail-based uses, despite having up to six times more floor area space within the central core." He also noted that "Uptown's specific travel demand management strategies, combined with the sector plan mixed uses, will produce greater air pollution reductions than the current trend retail-based uses." According to the planner's interpretation of the data, proposed "sector plan uses will be more conducive to averting [carbon monoxide] violations than retail-based use[s]." At the May 30, 1995, LUPZ meeting, a division planner countered ACP's characterization of the data as showing no difference in air quality, based on land use. The planner explained that there will be "fewer exceedances of the carbon monoxide standards with

the mixed uses" in the proposed sector plan if the plan is combined with "any amount" of transportation management strategies. Thus, the district court's finding that the only significant impact would come from stringent regionwide traffic measures is only one interpretation of the evidence, an interpretation rejected by the City.

{62} Additionally, the 95USP specifies the need for transportation management strategies as an adjunct to the mixed-use concept and contains transportation management goals related to improving air quality. The 95USP also requires new projects to have traffic mitigation plans that assess the impact of the project and outline measures that will be implemented to reduce traffic. Further, Resolution 94-1995 itself requires the establishment of a representative public-private task force to "[r]ecommend policies, standards and programs for traffic reduction and congestion management citywide that are similar to those implemented in Uptown." Therefore, contrary to the district court's findings, we find that the record demonstrates the reasonableness of the City Council's interpretation of the air-quality studies and the City Council's ultimate decision to approve the 95USP. *Tallman v. ABF (Ark. Best Freight)*, 108 N.M. 124, 129, 767 P.2d 363, 368 (Ct.App.1988) ("The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's findings are unsupported by substantial evidence."). On whole record review, a reviewing court must uphold the zoning authority's decision if that decision is supported by substantial evidence. *Paule v. Santa Fe County Bd. of County Comm'rs*, 2005-NMSC-021, ¶ 32, 138 N.M. 82, 117 P.3d 240. The reviewing court may not substitute its judgment merely because there is evidence supporting a different conclusion. *Id.*

*4. Resolution 270-1980*

{63} The district court determined that the 95USP created a new zone, subject to Resolution 270-1980; that there was no substantial evidence that the City complied with this resolution; and, further, that ACP's property was downzoned, in violation of Resolution 270-1980. The City counters, arguing that Resolution 270-1980 does not apply in this case because the 95USP was accomplished by a text amendment and text amendments are not covered by the resolution. We agree with the City.

{64} Resolution 270-1980 states the following:

> ADOPTING POLICIES FOR ZONE MAP CHANGES AND SUPERSEDING CITY COUNCIL RESOLUTIONS 217-1975 AND 182-1978 RELATING TO ZONE CHANGE APPLICATIONS AND APPEALS.
>
> WHEREAS, the usefulness of the Comprehensive City Zoning Code in implementing the City's Comprehensive Plan and promoting health, safety, morals, and general welfare is enhanced by a reasonable flexibility in order to deal reasonably with changes in the physical, economic, and sociological aspects of the city; and
>
> WHEREAS, certain general policies for consideration of zone map changes and other zoning regulation changes should be recognized as determinative.
>
> BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:
>
> Section 1. The following policies for deciding zone map change applications pursuant to the Comprehensive City Zoning Code are hereby adopted:

A. A proposed zone change must be found to be consistent with the health, safety, morals, and general welfare of the City.

B. Stability of land use and zoning is desirable; therefore, the applicant must provide a sound justification for the change. The burden is on the applicant to show why the change should be made, not on the City to show why the change should not be made.

C. A proposed change shall not be in significant conflict with adopted elements of the Comprehensive Plan or other City master plans and amendments thereto including pr[i]vately developed area plans which have been adopted by the City.

D. The applicant must demonstrate that the existing zoning is inappropriate because

(1) there was an error when the existing zone map pattern was created, or

(2) changed neighborhood or community conditions justify the change, or

(3) a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan, even though (1) or (2) above do not apply.

E. A change of zone shall not be approved where some of the permissive uses in the zone would be harmful to adjacent property, the neighborhood or the community.

F. A proposed zone change which, to be utilized through land development, requires major and unprogrammed capital expenditures by the City may be

(1) denied due to lack of capital funds or

(2) granted with the implicit understanding that the City is not bound to provide the capital improvements on any special schedule.

G. The cost of land or other economic considerations pertaining to the applicant shall not be the determining factor for a change of zone.

H. Location on a collector or major street is not in itself sufficient justification of apartment, office, or commercial zoning.

I. A zone change request which would give a zone different from surrounding zoning to one small area, especially when only one premise is involved, is generally called a "spot zone." Such a change of zone may be approved only when

(1) the change will clearly facilitate realization of the Comprehensive Plan and any applicable adopted sector development plan or area development plan; or

(2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones; because the site is not suitable for the uses allowed in any adjacent zone due to topography, traffic, or special adverse land uses nearby; or because the nature of structures already on the premises makes the site unsuitable for the uses allowed in any adjacent zone.

J. A zone change request which would give a zone different from surrounding zoning to a strip of land along a street is generally called "strip zoning." Strip commercial zoning will be approved only where

> (1) the change will clearly facilitate realization of the Comprehensive Plan and any adopted sector development plan or area development plan, and
>
> (2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones or because the site is not suitable for the uses allowed in any adjacent zone due to traffic or special adverse land uses nearby.
>
> Section 2. City Council Resolutions 217-1975 and 182-1978 adopting policies for zone map change applications and appeals of Environmental Planning Commission are hereby superseded.

Resolution 270-1980. Interpretation of the language of a resolution related to zoning is similar to interpretation of a zoning ordinance. Such interpretation is a matter of law, which we review de novo using the same rules of construction that apply to statutes. *Smith*, 2005-NMSC-012, ¶ 18. We begin by reviewing the "plain language" of the resolution. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. We give words their ordinary meanings, without adding terms the enacting body did not include, unless a different intent is indicated. *Id.*

{65} The title of the resolution refers to the adoption of zone map changes and then indicates that the resolution is to supercede certain resolutions relating to applications and appeals. The text of the lettered subsections of Section 1 of the resolution deals exclusively with zone change applications and sets forth what information is required and who has the burden

to supply the justification for a zone change. No other type of application is mentioned in Section 1. Importantly, the wording of Section 1 indicates that the adopted policies are for deciding "*zone map change applications*." (Emphasis added.) Section 2 effectively repeals previous resolutions regarding zone map change applications and appeals to the EPC. Giving the words in this resolution their ordinary meanings, we find it clear that the main text of Resolution 270-1980 (i.e., Section 1) refers to zone map changes only and that the policies do not apply to text amendments or to amendment of sector development plans that do not involve zone map amendments, as in this case. Reading the resolution in its entirety, we also find it clear that the "other zoning regulations" in the second "whereas" clause can only refer to the repeal portion of the resolution set out in Section 2 of the resolution.

{66} The language of Resolution 270-1980 was also considered in *Hart v. City of Albuquerque*, 1999-NMCA-043, ¶¶ 19-24, 126 N.M. 753, 975 P.2d 366. This Court described the resolution as articulating "the policies for approving a zone map change." *Id.* ¶ 20. Our conclusion is further buttressed by the language contained in Section 14-16-4-1 of the Code, setting forth the amendment procedure. Zone map amendments and text amendments are treated distinctly. *See* Code § 14-16-4-1. *Compare* Code § 14-16-4-1(A)(3), which deals with zone map amendments, *with* Code § 14-16-4-1(A)(4), which deals with text amendments; *compare* Code § 14-16-4-1(C), which sets forth the procedures for hearings and decision for proposed zone map amendments, *with* Code § 14-16-4-1(D), which contains the procedures for hearing and decision for text changes. Amendment to a sector plan can be accomplished by amend-

ment of a zone map, amendment to the text of the sector plan, or both. Code § 14-16-4-3(A)(4), (5). When the amendment to a sector plan is by text amendment only, the application is subject to the same procedures as changes to the text in the Code, as described above. Code § 14-16-4-3(A)(5).

{67} The City's application form for the amendment of an adopted plan also separates out the types of action into two categories: "application for amendment" and "type of request." The category "application for amendment" allows the applicant to indicate the type of document to be amended: (1) Comprehensive Plan, (2) area or facility plan, or (3) neighborhood, corridor, or sector plan, or (4) other. Under "type of request," there are three choices: (1) map amendment, (2) policy or text amendment, or (3) other. The planning department completed an application to revise the sector plan; on that application, the department checked the box indicating the department was submitting an amendment to revise a sector plan by text amendment, not by map amendment. The City's zoning documents contemplate amendment to the zoning code by different methods, similar to the types of rezonings categorized by Ziegler that we outlined previously in paragraph 42 herein. Accordingly, based on the language of Resolution 270-1980 and our conclusion that the revisions to the 81USP were text amendments, we reverse the district court's conclusion that the City failed to follow the provisions of this resolution.

*5. Downzoning*

*a. Generally*

{68} Rezoning by map amendment or by text amendment may involve a downzoning. 3 *Rathkopf's, supra* §§ 38:2 to 38:3, at 38-3. As described in *Rathkopf's*,

the term "downzoning" is used to describe a rezoning to a less intensive use; examples include reclassification from industrial to residential or, as is often the case, a reduction in permitted residential density. 3 *Rathkopf's, supra* § 38:13, at 38-10. "Downzoning" is an informal word of art that almost never appears in the statutes or ordinances. 3 *Rathkopf's, supra* § 38:12, at 38-8. In New Mexico, "downzoning" is defined as "rezoning property to a more restrictive use." *Mandel*, 119 N.M. at 688, 894 P.2d at 1044. Downzoning normally involves only a single landowner and a small piece of property. *Id.* at 688-89, 894 P.2d at 1044-45. Although the definition does not specifically include text amendments, we look to *KOB-TV* and *Mandel*, two cases in which we evaluated the actions of a zoning authority in the context of a text amendment, to determine if a specific property had been downzoned. *KOB-TV*, 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708; *Mandel*, 119 N.M. at 688, 894 P.2d at 1044. In neither case did we find a downzone. *KOB-TV*, 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708; *Mandel*, 119 N.M. at 689, 894 P.2d at 1045.

{69} In determining that the City's revision of the Uptown Sector Plan constituted a downzoning of ACP's property, the district court determined that this case was factually similar to *Davis v. City of Albuquerque*, 98 N.M. 319, 648 P.2d 777 (1982). There, the City adopted a zoning map amendment pursuant to an amendment of the Comprehensive Plan. *Id.* at 320, 648 P.2d at 778. An eight-block area in the sector plan was downzoned from R-3 to SF, while the remaining area was allowed to continue in the same density. *Id.* at 321, 648 P.2d at 779. The Davis property, four contiguous lots on Silver SE, was included in the area that was downzoned from R-

3 to SF. *Id.* at 320, 648 P.2d at 778. Our Supreme Court determined that this downzoning was subject to the "change or mistake" rule adopted in *Miller*, 89 N.M. at 506, 554 P.2d at 668, even though the zoning change was done in conjunction with a revision of the sector plan. *Davis*, 98 N.M. at 320-21, 648 P.2d at 778-79. It was clear in *Davis* that the action of the zoning authority was downzoning, as it changed the zoning designation from medium-density residential to single-family residential. *Id.* at 320, 648 P.2d at 778. Further, the Court in *Davis* determined that the rezone was un-reasonable because it was inconsistent with the stated purpose of the Comprehensive Plan. *Id.* at 321, 648 P.2d at 779. The zoning change applied the restrictive zoning to a single landowner and left unaffected others who were similarly situated. *Id.* The Court acknowledged that its holding was not an attempt to limit the flexibility of a zoning authority to rezone, as long as the rezoning is reasonable, but found the facts insufficiently distinguishable from the *Miller* case to remove the *Davis* case from the "change or mistake" rule. *Id.* The Court determined that there was, in fact, an unreasonable rezoning of a small piece of land. *Id.*

{70} In our case, there is no change to the zoning map. The zoning remains SU-3, Special Use Center, with site development approval required. The revisions affect the type of commercial uses and require high-density uses in the inner core, which were simply a quantification of what was envisioned by the 81USP and what the City would have had the right to approve or disapprove under the 81USP in any event. There is no change in the fact that any development will have to get City approval. Contrary to *Davis*, the changes here were entirely consistent with the City's master plan and its vision of an

uptown urban center. Again, we look to the evidence in the record, which disclosed that after a good deal of study and reports from experts on traffic, air quality, and transportation, as well as feedback from city planners and neighborhood associations, the City made a policy decision regarding future development in the Uptown Sector. This policy decision was made in connection with a planning document whose purpose was to give more guidance to developers in the urban Uptown Sector. The policy decision was entirely consistent with the City's master plan, which designates Uptown as an urban center. These facts are different from those in *Davis* and *Miller* and support a different conclusion.

{71} The restrictions in the 95USP simply quantified and made more specific the vision that was already stated generally in writing in the Comprehensive Plan and the 81USP and delineated how that vision would specifically come to pass in future development. Further, contrary to *Davis*, the changes here apply not only to ACP but to all property owners in the intense core. Thus, ACP was not being treated differently from other similarly situated landowners in the core of the Uptown Sector. There was no downzoning here.

*b. Targeting*

{72} ACP maintains that the City targeted ACP's property and thereby effected a downzone, requiring due process and a quasi-judicial hearing. We have already rejected, in paragraphs 36-39 herein, ACP's contention regarding the necessity for a due process quasi-judicial hearing. As to the targeting, ACP relies on *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 895-96 (6th Cir.1991), and on *Harris v. County of Riverside*, 904 F.2d 497,

501-03 (9th Cir.1990), which are distinguishable. In both cases, a rezoning occurred, resulting in fundamental change to the uses allowed on a landowner's property; however, in neither case had the municipality given the owner notice of the change, so the landowner had no chance to protest. The cases were reversed, based on lack of notice. In our case, ACP had notice and objected to the revisions as they worked their way to the City Council for action. In addition, there was no targeting, and there was no fundamental change.

{73} The targeting argument was also made in *KOB-TV*: the TV station asserted that it had been targeted, and it contended that the elimination of helipad use as to its property was site specific. 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708. We have already dealt with this argument in paragraph 39 of this opinion. As we explained in *KOB-TV*, the challenged amendment established policy for the entire city and was "not one in which a single property was rezoned to a more restrictive use." *Id.* In this case's record, there is substantial evidence that adoption of the 95USP established policy for the entire city, and our review of the record supports the conclusion that ACP was one of several landowners in the inner core that became subject to the new requirements. While we agree that there is an opposing view of the evidence on this issue, as long as there was substantial evidence on the issue, it was up to the City Council, not the reviewing court, to make the final decision. *See Paule*, 2005-NMSC-021, ¶ 32, 138 N.M. 82, 117 P.3d 240.

*6. "Change or Mistake" Rule*

{74} The "change or mistake" rezoning doctrine was first adopted in Maryland, then Mississippi, and has

been adopted to varying degrees in a minority of states, including New Mexico. 3 *Rathkopf's, supra* §§ 42:2 to :3, at 42-3 to -5 (footnotes omitted) (listing in a footnote a number of jurisdictions in which the "change or mistake" doctrine has been adopted to varying degrees). In New Mexico, *Davis* and *Miller* stand for the proposition that anyone seeking to rezone an owner's property to a more restrictive zoning must show either that there was a mistake in the original zoning or that since the original zoning, a substantial change has occurred in the character of the neighborhood to such an extent that the reclassification or change ought to be made. *Davis*, 98 N.M. at 320, 648 P.2d at 778; *Miller*, 89 N.M. at 506, 554 P.2d at 668. Both cases dealt with rezoning by map amendment. *Davis*, 98 N.M. at 320, 648 P.2d at 778 (changing the property classification from R-3, medium- to high-residential density, to SF, single-family residential); *Miller*, 89 N.M. at 504, 554 P.2d at 666 (amending zoning classifications of R-1 and R-3 to the more restrictive classification of SU-1). In our case, the rezoning was accomplished by text amendment to a sector plan; the zoning designation remained the same.

{75} In *KOB-TV*, we recognized that the "change or mistake" rule does not apply to rezoning by text amendment. 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708 (acknowledging that the "change or mistake" rule applies when there is rezoning to a more restrictive classification but recognizing that there was no change in the zoning of KOB's property). This Court rejected KOB's claim that the city's actions amounted to a downzoning that required a change or mistake in the original zoning. *Id.* In paragraph 74 herein, we have already held that the City's action was not downzoning. We also hold that the

"change or mistake" rule does not apply to rezoning by text amendment. This is consistent with our reading of 3 *Rathkopf's, supra* § 42:3, at 42-3 to -5, specifically footnote 3, wherein all of the cases cited relate exclusively to rezoning by map amendment. *See* 1 Williams, *supra* § 33:1, at 837 (describing the rule as applying to changes in the zoning map).

{76} Although our reliance on *KOB-TV* disposes of the issue, we explain why we decline to expand application of the rule to text amendments. First, any enlargement of the doctrine to rezoning by text amendment would be a first; currently, the "change or mistake" rule employed in other jurisdictions applies to map amendments only. *See* 3 *Rathkopf's, supra* § 42:3, at 42-3 to -5; 1 Williams, *supra* § 33:1, at 837. Second, we are concerned that the rule itself is the minority position and that it is often criticized. The rule has been described as a "clear example of a legal doctrine based upon a misunderstanding of the nature of the planning process." 1 Williams, *supra* § 33:1, at 837. The "change or mistake" rule has been almost exclusively a Maryland doctrine, with few exports to other states, and has "occasionally turned up in other states with less experience in zoning litigation." *Id.* at 838. Further, this rule has been criticized as giving the original zoning a greater presumption of correctness than the amendment and has thereby prevented the zoning authority from making zone changes, no matter how reasonable and desirable they may be. *Neuzil v. City of Iowa City*, 451 N.W.2d 159, 165 (Iowa 1990). While we recognize that the specific facts of *Miller* and *Davis* dictated the application of the "change or mistake" rule to those cases, we also observe that in *Davis*, the Court recognized the importance of allowing the zoning authority to make reasonable changes and seemed to

limit the application of the "change or mistake" rule to the situation in that case. 98 N.M. at 321, 648 P.2d at 779 (stating that "a more reasonable downzone or a more reasonable comprehensive plan might be sufficient to remove the case" from application of the rule). For these reasons, we are reluctant to extend the rule.

{77} ACP cites to *West Old Town Neighborhood Ass'n* as support for the district court's application of the "change or mistake" rule. In that case, the sector development plan had established the zoning for the area covered by the plan, which included land inside and outside the city limits. *W. Old Town Neighborhood Ass'n*, 1996-NMCA-107, ¶ 4, 122 N.M. 495, 927 P.2d 529. The applicant filed an annexation petition to annex certain land into the city and also sought to amend the sector plan to allow RA-2 zoning. *Id.* The land in question had been zoned RA-1 in the sector plan. *Id.* The city approved the annexation but rezoned the annexed land to SU-1; it also amended the sector plan to permit the new SU-1 zoning on this particular property. *Id.* ¶ 6. The city's planning ordinance, however, contained a procedure to be followed when a requested zoning change was different from the zoning designation already contained in an existing sector plan; the procedure required the filing of two applications: one to amend the zoning map and another to amend the sector plan. *Id.* ¶ 16. This Court reversed the decision of the city because it failed to comply with its own requirements for zoning map and sector map amendments. *Id.* ¶ 27. Our discussion of the "change or mistake" rule was made in the context of the rule's application to a change in the zoning designation from RA-1 to SU-1. *Id.* ¶ 22. Here, as we have explained above, there is no conflict between the zoning designation in the 81USP and the

95USP; the zoning classification remains SU-3. Unlike the situation in *West Old Town Neighborhood Ass'n*, there is no requirement here that the zoning map be amended; therefore, the "change or mistake" rule is inapplicable.

*III. CONCLUSION*

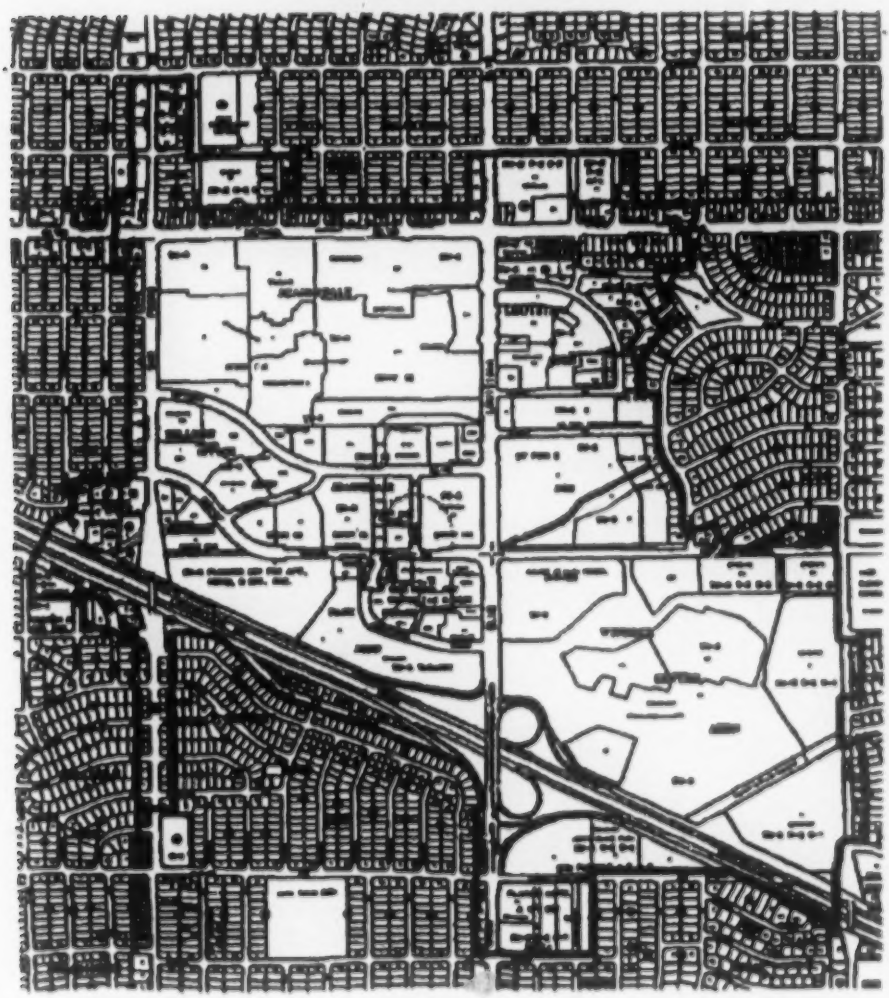
{78} We hold that the 1995 revisions to the Uptown Sector Plan were legislative action establishing area-wide policy for the future development of the Uptown Sector. We reverse the district court's determination that the revisions downzoned ACP's property. Likewise, we reverse the district court's order remanding to the City to consider the Opus site plan under the 81USP. Therefore, the district court's later order requiring approval of the plan is reversed as a nullity. We note that even if the plan were required to be reviewed under the 81USP, the City would have discretion to deny it as inconsistent with the Comprehensive Plan. Finally, because the basis of the jury's verdict was the downzoning of ACP's property without a quasi-judicial hearing, which resulted in multiple violations of the United States Constitution, we reverse the jury verdict.

{79} *IT IS SO ORDERED.*

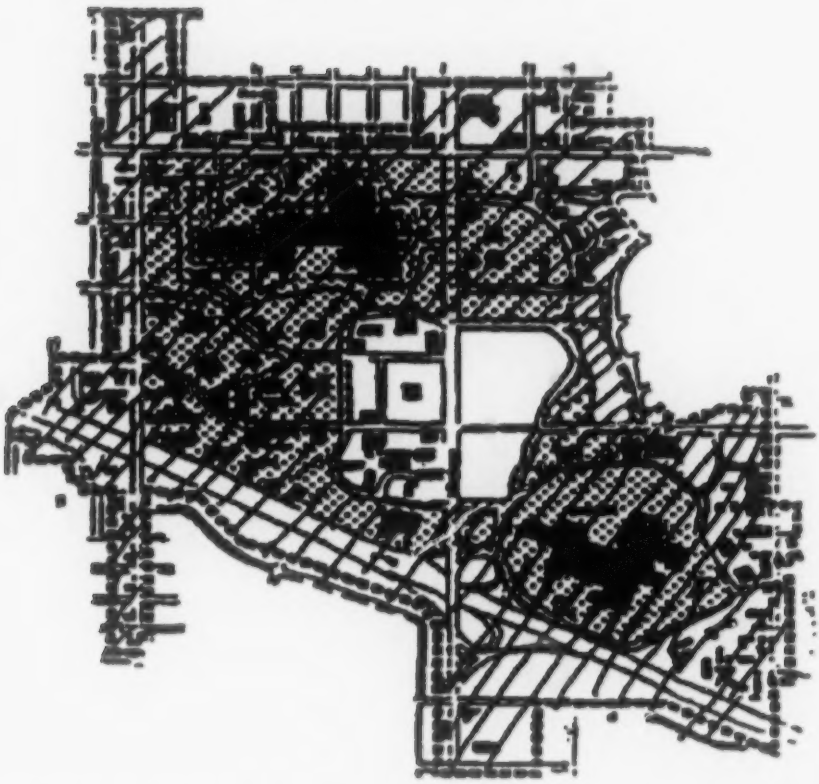
WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and LYNN PICKARD, Judge.

# APPENDIX A

## UPTOWN SECTOR DEVELOPMENT PLAN
## PARCEL ZONING

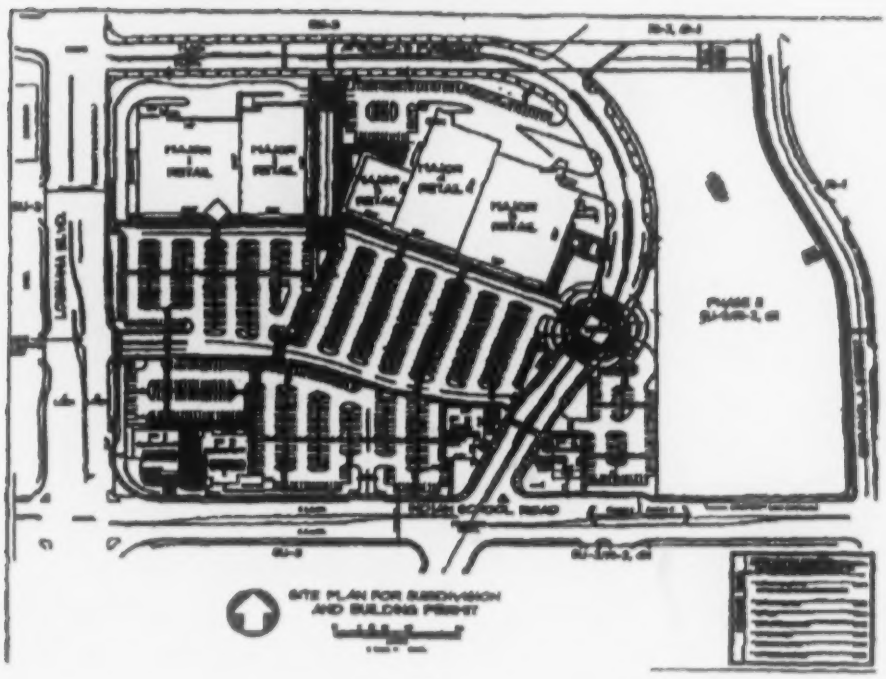


## APPENDIX B



Unlined area is inner core surrounded by Loop Road.

# APPENDIX C



CASTILLO, *Judge*.

{80} In its motion for rehearing and the briefs in support of the motion, ACP raises four issues that are the subject of this order: ACP's contention that the City erred in amending the 81USP by resolution, instead of by ordinance; ACP's contention that this opinion will now allow municipalities to change zoning by words, instead of by maps; ACP's allegation that this Court misunderstood the specific zoning of the Uptown area; and ACP's position that the takings verdict should stand. We address each issue in turn.

## *I. ISSUES*

### *A. Resolution Versus Ordinance*

{81} ACP contrasts the language of Section 14-16-4-1(D) of the Code, which directs that text amendments be made by ordinance, with Section 14-16-4-1(C)(9) of the Code, which does not require an ordinance to effect zone map amendments. ACP then contends that because the amendments to the 81USP were made by resolution and not by ordinance, the City did not follow its own procedures and, further, that use of a resolution, instead of an ordinance, evidences the City's intent to amend the 81USP by zone map amendment.

{82} While we agree that the zoning code does contemplate that amendments to the text of the code be made by ordinance, the adoption of the 95USP by resolution does not end the inquiry. A similar argument was made in *West Old Town Neighborhood Ass'n*, 1996-NMCA-107, ¶ 12, 122 N.M. 495, 927 P.2d 529. Our analysis in that case was based on the premises that when a resolution is in substance an

ordinance or a permanent regulation, the name given to the resolution is immaterial, and that if it is passed with all the formality of an ordinance, the resolution thereby becomes a legislative act. Thus, it is not critical whether it be called an ordinance or a resolution. There is no argument here that the 95USP was not adopted with the same formality as that of an ordinance. There were numerous hearings on the proposed amendments to the 81USP, and the City Council finally adopted the resolution on a 7-0 vote. Consequently, we will not "violate a basic tenet of judicial review by exalting form over substance." *W. Old Town Neighborhood Ass'n*, 1996-NMCA-107, ¶ 13, 122 N.M. 495, 927 P.2d 529.

*B. Zoning by Words*

{83} ACP contends that our opinion will allow municipalities to actually change zoning by the vehicle of text amendments. We disagree because we have held that the text amendment here did not actually change the zoning. We appreciate ACP's concern, but it does not apply to the facts of this case. Further, "[s]hould such a course of procedure be pursued in other cases, we will know how to deal with it." *State ex rel. Delgado v. Stanley*, 83 N.M. 626, 627, 495 P.2d 1073, 1074 (1972).

*C. Zoning in the Uptown Sector*

{84} ACP characterizes the zoning in the Uptown Sector under the 81USP as "SU-3 Zone for the Uptown Metropolitan Urban Center" and maintains that this Court erroneously concluded that the zoning for this part of Uptown is the generic "SU-3 Special Center Zone." ACP misreads the opinion. In paragraph 59 of the opinion, we discussed the definition of SU-3 as set out in the Code, and we

focused on the flexibility allowed by this type of zoning. The areas within the boundaries of the City are divided into basic zones, and SU-3 is one of the zones. Code § 14-16-2-1. Uses must be consistent with the master plan and may be specified by a duly adopted Sector Development Plan. Code § 14-16-2-24(A). "Specifications contained in the Sector Development Plan shall control." *Id.* ACP argues that we mistakenly considered the intense core as zoned "SU-3 Special Center Zone" without any specification of permitted uses, while the land was in fact zoned "SU-3 Zone for the Uptown Metropolitan Urban Center" with specific allowance of uses that are for the most part permissive in C-2 zones. The denomination "SU-3 Zone for the Uptown Metropolitan Urban Center" does not zone this area. It is the title of this section of the 81USP and does not affect the SU-3 zoning designation. The additional language merely indicates the location of the SU-3 Zone. We agree with ACP that the 81USP lists permitted uses in the SU-3 Zone; our points were that SU-3 zones can have different permitted uses and that this is allowed under this type of zoning designation. ACP also seems to be arguing that all permitted uses listed in the 81USP are allowed. This is not the case. Even though a use is permitted, that use as set out in a proposed site development plan might not be approved. All permissive uses are "subject to site development plan approval," and in the approval of a site development plan, requirements may be imposed "as may be necessary to implement the purpose of [the 81USP]."

*D. Takings Verdict*

{85} This case was tried to a jury on alternative theories: violation of procedural due process resulting

in damages and a claim of a constitutional taking. The jury awarded damages on both claims. ACP then elected judgment on the due process violation to prevent a double recovery; judgment was entered thereon. ACP reads our opinion to reverse the due process judgment and asks this Court to clarify the effect of the opinion on the takings verdict, which ACP contends was not affected because there was evidence supporting the theory of takings involving the denial of all economically viable use of ACP property and this theory was not affected by our opinion. The City understands the opinion to reverse the takings verdict. We agree that this issue should be clarified, and we agree with the City.

{86} The parties take opposite views on the effect of ACP's electing judgment on the due process verdict. Citing to *Grogan v. Garner*, 806 F.2d 829, 839 (8th Cir.1986), ACP contends that if one verdict is lost on appeal, the judgment should be modified to substitute the other verdict. The City contends that ACP has forfeited its right to resurrect the takings verdict because a judgment of dismissal was entered on the verdict and because ACP did not appeal and thus waived the issue. Since we are reversing the takings verdict on a separate ground, we need not address the effect of the election of verdicts on this case.

{87} ACP relied on two experts to prove that the City had denied ACP all economically viable use of its property: Anne Ricker and Michael Halsey. Both experts opined that the 95USP prevented any type of development on the property that would be economically feasible for ACP. What they failed to take into account, however, was the effect of the 81USP. Ms. Ricker testified that she made no analysis as to whether the site plan "was approvable under the

1981 Sector Plan." Mr. Halsey agreed with Ms. Ricker's opinion, and his testimony contained no information about the effect of the 81USP on the site plan. The effect of our opinion has been to uphold the City's denial of the site plan under the 81USP. This fact was not considered by the experts in coming to their opinions, and their opinions were expressly based on the idea that the 95USP did something to ACP's right to develop the property that was different from the 81USP; therefore, those opinions cannot provide the basis for the damages awarded in this case. *See Grudzina v. N.M. Youth Diagnostic & Dev. Ctr.*, 104 N.M. 576, 582, 725 P.2d 255, 261 (Ct.App.1986) (observing that "an expert's opinion is only as good as the factual basis for it"); *Niederstadt v. Ancho Rico Consol. Mines*, 88 N.M. 48, 51, 536 P.2d 1104, 1107 (Ct.App.1975) (stating that if the expert who testifies lacks pertinent information, his or her opinion cannot satisfy the burden imposed by the applicable statute). Since ACP's proposed development could not have been built under the 81USP, no damages could have resulted from similar prohibitions under the 95USP, and ACP therefore failed in its burden to prove that the 95USP effected an unconstitutional taking caused by the denial of all economically viable use of the property. Accordingly, we reverse the takings verdict.

*II. MOTIONS*

{88} All motions filed after the motion for rehearing are hereby denied.

{89} *IT IS SO ORDERED.*

WE CONCUR: MICHAEL D. BUSTAMANTE, *Chief Judge*, and LYNN PICKARD, *Judge*.

## APPENDIX D

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

[Filed Jul. 23, 1999]

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CV-95-06031

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ALBUQUERQUE COMMONS PARTNERSHIP,
*Petitioner,*

vs.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
*Respondent.*

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### *FINDINGS OF FACT AND CONCLUSIONS OF LAW—COUNTS I & II OF THE SECOND AMENDED PETITION.*

THIS MATTER having come on for hearing by the Court, the Court having received extensive oral and written arguments from the parties, and having conducted a whole record review of the record proper, the Court makes the following findings of fact and conclusions of law.

1. *Findings of Fact*:

   a. The 1995 Revised Uptown Sector Plan creates a new zone: the intense urban core.

   b. That core consists of 50.65 acres, of which Petitioner leases 17.90 acres and Albuquerque Public Schools own 7.52 acres.

c. Those two properties and a smaller property are the only vacant lands in the intense urban core.

d. Winrock and Coronado Centers are outside this intense urban core.

e. All the land inside the intense core and most of the land outside in Uptown is zoned SU-3, but the regulations for use inside and outside the core are markedly different.

f. Outside the intense urban core, retail and commercial uses, including shopping centers, are allowed for existing uses, and for redevelopment and replacement of existing space. Only brand new retail development is restricted.

g. Inside the intense core, no shopping centers are allowed and retail uses are limited to 20,000 sq.ft. per "establishment", and to no more than 10% of the developed floor space. Inside the core, the required floor area ration (FAR) is very intense (0.7 to 1.5 FAR). Outside, the development may be less intense (0.3 to 1.0 FAR). Outside the core, parking lots are allowed. Inside the core, the parking must be on site in a parking structure.

h. There are additional restrictions on land use inside the core that are not imposed outside the core.

i. The most burdensome of the new requirements contained in the 1995 Revised Uptown Sector Plan fall on Petitioner, and on the owner of two other parcels, one of which is small.

j. The Middle Rio Grande Council of Governments air quality impact assessment (dated May 16, 1995) showed that there were no significant differences in air pollution between the current retail trends and the proposed uses under the Revised Plan.

k. The City's own air quality and traffic analysis showed that the only significant impact on air pollution would come from imposing stringent Traffic Demand Management (TDM) measures on a region wide basis.

l. No such measures were included in the 1995 Revised Sector Plan.

m. City Resolution 270-1980 requires that rezoning decisions must be based on an error in the existing zoning map, on changed neighborhood or community conditions or on the premise that a different use category would be more advantageous to the community.

n. The City made no findings and does not now take the position that there was an error in the original Uptown Sector Plan.

o. The only condition cited by the City Council was motor vehicle use threatening air quality standards; and it is not explicitly stated as a changed condition.

p. Assuming it is a changed condition, the Plan revisions have no appreciable impact on this condition.

2. *Conclusions of Law:*

a. The City Council is the planning and zoning authority of the City of Albuquerque.

b. The City Council has the authority to enact and amend Sector Development Plans.

c. To the extent that the City based its burdening Petitioner's property with these markedly different and more stringent regulations on an assumption that imposition of these regulations would make a positive difference on traffic congestion and air pollution, there was no substantial evidence to support that conclusion.

d. There is no substantial evidence that the City Council met its burden of demonstrating that there was an error in the 1981 Uptown Sector Plan, that changes in the neighborhood or in the community conditions justified this revision to the 1981 Uptown Sector Plan, or that the amendments were more advantageous to the community.

e. There was no substantial evidence that the community would be advantaged by the application of the most rigorous and burdensome requirements, which set highly intense FARs, decimated allowable retail use and required structured parking for very few properties, while allowing much less restrictive development outside of the urban core of Uptown.

f. The creation of the intense urban core of the Revised Uptown Sector Development Plan amounted to a down zoning of the property in which Petitioner has a lease hold interest.

g. The *Miller* rule pertains not only to piecemeal rezoning, but to any unreasonable rezoning of only a small piece of land; see

*Davis v. City of Albuquerque*, 98 N.M. 319, 648 P.2d 665 (1976).

h. There is no substantial evidence that the City Council met its burden of demonstrating that there was an error in the 1981 Uptown Sector Plan, that changes in the neighborhood or in community conditions justified this revision to the 1982 Uptown Sector Plan, or that the amendments were more advantageous to the community.

i. Demonstration of one of these factors is especially important when it is the City that is initiating the change and the change, as it is here, is more restrictive.

j. Petitioner's property was down zoned contrary to the *Miller* rule and in violation of City Resolution 270-1980.

k. The zoning action was a quasi-judicial act by the City Council of the City of Albuquerque, *Dugger v. City of Santa Fe*, 114 N.M. 47, 834 P.2d 424 (Ct.App.1992), and as such is subject to whole record review by this Court. *West Old Town Neighborhood Assn. v. City of Albuquerque*, 122 N.M. 495, 927 P.2d 529 (Ct.App.) *cer. denied* (1996).

l. Where the zoning body participates in the decision-making process, both as petitioner and as judge, it must follow its own rules.

m. By failing to give reasons for its changes to the 1981 Uptown Sector Plan, the City Council failed to comply with its own procedures and deprived Petitioner of procedural due process.

n. By hearing its own application for amendments to the Uptown Sector Plan without providing Petitioner with procedural safeguards, the City Council deprived Petitioner of its right to a meaningful and impartial decision-maker.

All requested findings and conclusions not consistent herewith are refused.

/s/ SUSAN M. CONWAY
SUSAN M. CONWAY
District Judge

## APPENDIX E

[SEAL]

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT
DIVISION XVIII

---

CHAMBERS OF
SUSAN M. CONWAY
DISTRICT JUDGE

P.O. BOX 488
ALBUQUERQUE, NM 87103
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June 17, 1998

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RE: *Albuquerque Commons Partnership v. City of Albuquerque*
NO. CV 95-6031

Dear Counsel:

The Court has finally made its decision on the whole record review in this case. There were many reasons (but few excuses) for taking this long to decide this aspect of the case: the time it took to per-

sonally review the 2356 pages of the record[1]; the time it took to read, analyze, reread and reanalyze the case law, ordinances and statutes; and the fact that counsel's factual summaries created more disputes and confusion than they were intended to prevent.

The principal reason for the delay, however, was the fact that this case simultaneously looked like two irreconcilably inconsistent cases. One case is the story of a very careful, thorough, inclusive process of developing creative legislation to amend the Sector Development Plan of a critical section of the city, a model of staff expertise provided from all relevant city departments, input from all the various interests to be affected by a revised Sector Development Plan, both in writing and at the many hearings held on the Plan, consideration of competing interests by LUPZ and the EPC, and final decision by the City Council, followed by approval from the Mayor.

The goals expressed in the Revised Plan are laudable, and the City is correct in its determination that enhancing Uptown's urban character is important to Albuquerque as a whole. The regulations for orientation of uses, landscaping, street treatments, parking, enhancement of the pedestrian environment and open space are especially well thought out and show the results of the City's expertise and of the extensive neighborhood and other community input into the process. Viewed as legislation, without considering who will bear the burden of that enhancement, there

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[1] Pages 670-672 and 674-675 are missing from the record provided to the Court. They consist of two letters from the Petitioner, to the City attorney and to Council President Griego, respectively. It is highly doubtful they contain material the Court has not already reviewed.

is little to criticize, and nothing Plantiff and Court should overrule.

There is another case, however. In the second case, the City has placed a burden on the Petitioner of fulfilling a vision the community has created for Uptown, after the City has allowed prior development contrary to that vision. R. 624, 903. The most burdensome of the new requirements fall on Petitioners, on Albuquerque Public Schools and on the owner of another small parcel in Uptown.

The second case also involves the City's basing its burdening Petitioner on an assumption that this imposition would make a positive difference in traffic congestion and air pollution. The City learned from the Middle Rio Grande Council of Governments (MRCOG), in its May 16, 1995 air quality impact assessment, that there were no significant differences in air pollution between the current retail trends and the proposed uses under the revised Plan. Every analysis showed that the only significant impact on air pollution would come from imposing stringent Traffic Demand Management (TDM) measures on a region wide basis. Such measures are not in the Revised Plan. R. 1260, 901-956.

Which case is the one before the Court? There have been times in my review when I have been sure this is the first case, and times when I have been equally sure it is the second case. After much thought and review of the facts and the law, however, I have come to the final conclusion that this is the second case, that the City's Uptown Sector Development Plan cannot be applied to Petitioner's property, and that the Petitioner's proposed site development plan must be reviewed under the previous Sector Plan.

The legal analysis follows:

1. The 1995 Revised Uptown Sector Plan creates a new zone: the intense urban core. That core consists of 50.65 acres, of which Petitioner leases 17.90 and Albuquerque Public Schools owns 7.52 acres. R. 733. Those two properties and a smaller property are the only vacant lands in the intense urban core, which is bounded by the existing loop road west of Louisiana Boulevard. Winrock and Coronado Centers are outside this urban core.

All the land inside this intense core and most of the land outside it in Uptown is zoned SU-3, but the regulations for use inside and outside the core are markedly different. Outside the core, retail and commercial uses, including shopping centers, are allowed for existing uses, and for redevelopment and replacement of existing space. Only brand new retail development is restricted. Inside the core, no shopping centers are allowed, and retail uses are limited to 20,000 square feet per "establishment", and to no more than 10% of the developed floor space. Inside the core, the required floor area ratio (FAR) is very intense, a minimum of 0.7 and a maximum of 1.5. Outside, the development may be less intense, from a 0.3 to 1.0 FAR. Outside the core, parking lots are allowed. Inside the core, the parking must be on site in a parking structure. Existing surface parking (not on Petitioner's land) may continue until redeveloped. There are additional restrictions on land use inside the core that are not imposed outside the core.

The creation of the intense urban core amounted to down zoning of the three vacant properties therein. This zoning action determined, in particular, how property proposed for development by OPUS Southwest Development Council could be used. This case is

factually similar to *Davis v. City of Albuquerque*, 98 N.M. 319, 648 P.2d 777 (1982), where the city down zoned eight blocks of a sector from R-3 to R-1, while only slightly down zoning the surrounding area. In *Davis*, the Court clarified that *Miller v. City of Albuquerque*, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976) pertains not only to piecemeal rezoning but to any unreasonable rezoning of only a small piece of land. Also, even when down zoning is done pursuant to a comprehensive plan, it must be based on mistake or change.

2. Said zoning action was a quasi-judicial act by the City Council, *Dugger v. City of Santa Fe*, 114 N.M. 47, 51, 834 P.2d 424, 428 (Ct. App. 1992), and, as such, is subject to whole record review by this Court, *West Old Town Neighborhood Ass'n v Albuquerque*, 122 N.M. 495, 498, 927 P.2d 529, 532 (Ct. App.), *cert. denied*, (1996):

> "Because the challenged zoning actions are quasi-judicial, the administrative standard of review would be the appropriate standard. [citation omitted] We apply a whole record standard of review to administrative decisions looking at all the evidence, favorable and unfavorable, bearing on a decision to determine if there is substantial evidence to support the result."

3. Pursuant to Resolution 270-1980, rezoning decisions must be based on an error in the existing zone map, on changed neighborhood or community conditions or on the premise that a different use category would be more advantageous to the community. *West Old Town*, at 500. Demonstration of one of these factors is especially important when it is the City that is initiating the change and the change, as it is here, is more restrictive.

> "If a zoning body is going to attempt to participate in the decision-making process as both petitioner and judge, the very least that can be expected is that it will play the game according to its own rules." *Miller* at 507.

4. The record is not supported by substantial evidence that the City Council met its burden of demonstrating that there was an error in the 1981 Uptown Sector Plan, that changes in the neighborhood or in community conditions justified this revision to the 1981 Uptown Sector Plan, or that the amendments were more advantageous to the community. The City made no findings and does not now take the position that there was an error in the original Uptown Sector Development Plan. The only condition cited by the City Council (R. 623, 903) was motor vehicle usage threatening air quality standards; and it is not explicitly stated as a changed condition. Assuming it is a changed condition, the Plan revisions have no appreciable impact on this condition, as noted above. Finally, there was no substantial evidence that the community would be advantaged by application of the most rigorous and burdensome requirements, which set the highly intense FAR, decimated allowable retail use and required structured parking for very few properties, while allowing much less restricted development outside of an urban core of Uptown.

5. By failing to give reasons for its changes to the 1981 Uptown Sector Plan, the City Council failed to comply with its own procedures and deprived Petitioner of procedural due process (notice and the opportunity to prepare an adequate defense). *Miller* at 506. *See also Muiler v. City of Albuquerque*, 92 N.M. 264, 587 P.2d 42 ((1978) which relied upon *City of Roswell v. New Mexico Water Qual. Con. Comm'n*,

84 N.M. 561, 505 P.2d 1237 (Ct. App. 1972) for the proposition that while *formal* findings are not required, the record must indicate the reasoning of the fact finder and the basis on which it adopted the action. [sic]

6. By hearing its own application for amendments to the Uptown Sector Plan without providing Petitioner with procedural safeguards, the City Council deprived Petitioner of its right to a meaningful and impartial decision-maker. *Miller* at 507. It is true that Petitioner (and Winrock and Coronado Centers, and the neighborhood associations, and the Uptown Association, and members of the public) had more opportunities to provide written material to various City staff and committees than is generally allowed in a quasi judicial proceeding, and more occasions when it was given the opportunity to address City staff and agencies orally (usually for three to ten minutes). Such opportunities are no substitute for a hearing before an impartial decision maker, however, which is what Petitioner was entitled to.

Petitioner should prepare a proposed order on this ruling, obtain opposing counsel's approval as to form and submit it to the Court at the status conference set for July 10, 1998, notice of which is send [sic] under separate cover.

/s/ SUSAN M. CONWAY
THE HONORABLE SUSAN M. CONWAY
DISTRICT JUDGE

**APPENDIX F**

THE SUPREME COURT OF THE
STATE OF NEW MEXICO

---

No. 31,725

---

ALBUQUERQUE COMMONS PARTNERSHIP,
*Petitioner-Respondent and Cross-Petitioner*,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
*Respondent-Petitioner and Cross-Respondent*.

---

June 22, 2009

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ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, response and conditional cross-petition for writ of certiorari the court have considered said pleadings, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petitions for writ of certiorari are denied in Court of Appeals number 24026/24027/24042/24425.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 22nd day of June, 2009.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

No. 09-564

Supreme Court, U.S.
FILED
JAN 8 - 2010
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,

*Petitioner*,

*v.*

ALBUQUERQUE COMMONS PARTNERSHIP,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

## BRIEF IN OPPOSITION

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January 8, 2010

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## QUESTIONS PRESENTED

Respondent ACP's leased land was spot-downzoned by the City to block a planned project, precluding any economically viable use of the site. ACP paid five years of lease payments totaling more than $8,000,000 before the lease could be ended to mitigate losses. A jury found the downzoning proceedings violated ACP's 14th Amendment right to procedural due process, and awarded ACP its out-of-pocket losses caused by the violation. The issues presented, which do not warrant this Court's review, are:

1. When state law creates a protected property interest in continuation of a site's zoning unless a city proves specific criteria for spot-downzoning and the city knowingly refuses to provide the owner with either a meaningful hearing or an unbiased decisionmaker on a spot-downzoning decision, may the city avoid liability under 42 U.S.C. §1983 for the losses resulting from its violation of due process simply by conducting the downzoning in the *form* of a legislative proceeding?

2. Is a §1983 action for losses caused by a city's violation of the owner's 14th Amendment right to procedural due process during a spot-downzoning precluded when the deprivation was not random and unauthorized but intentional and where state law does not provide any remedy for recovery of the owner's $8,000,000 in out-of-pocket losses caused by the City's unconstitutional actions?

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Albuquerque Commons Partnership is a Texas general partnership and there is no publicly held company that owns 10% or more of the partnership.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF APPENDICES | vi |
| TABLE OF CITED AUTHORITIES | vii |
| STATUTORY PROVISIONS INVOLVED | 1 |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | 4 |
| I. Facts Relevant to the Petition | 4 |
| II. Proceedings Below | 8 |
| JURISDICTION | 12 |
| I. This Case Is Still Pending In The New Mexico Supreme Court | 12 |
| II. Questions Presented by the City Were Not Preserved by the City's Petition for Writ of Certiorari to the New Mexico Supreme Court | 13 |

*Contents*


| | Page |
|---|---|
| ARGUMENT | 14 |
| I. Review Is Not Warranted Because The Court Of Appeals Applied Well-Settled Law To An Unusual State-Law Property Interest In Continued Zoning And To Facts That Are Not Likely To Recur | 14 |
| A. The Decision Below Reflects State Law Property Interests in Zoning | 16 |
| B. The City Waived its Challenge to the New Mexico Supreme Court's Decision | 17 |
| C. The City Mischaracterizes the Court of Appeals' Decision | 18 |
| D. The Authorities Relied On By The City Are Readily Distinguishable | 19 |
| E. The Court of Appeals Correctly Applied *Mathews* To A State-Created Property Interest | 23 |
| F. The Petition Raises No Substantial Federal Issue | 24 |

*Contents*

*Page*

II. Neither The Facts Nor The Holdings Of The New Mexico Courts Raise A Conflict With This Court's Decisions Requiring Use Of State Procedures In Certain Cases ..... 25

A. The City Has Not Identified The Court of Appeals Ruling It Challenges ..... 26

B. The City Has Not Preserved Its Ripeness Argument ..... 26

C. ACP Pursued Available State Remedies ..... 30

D. The Decisions The City Relies On Are Distinguishable Or No Longer Good Law ..... 33

CONCLUSION ..... 36

## TABLE OF APPENDICES

*Page*

Appendix G — Order Of The Supreme Court Of The State Of New Mexico Dated July 15, 2009 ..... 1a

Appendix H — Order Of The Second Judicial District Court, County Of Bernalillo, State Of Mexico Dated July 23, 1999 ..... 3a

Appendix I — Order Of The Second Judicial District Court, State Of New Mexico, County Of Bernalillo Dated June 19, 2001 ..... 8a

Appendix J — Petitioner-appellant City Council Of The City Of Albuquerque's Petition For Writ Of Certiorari Filed May 27, 2009 ..... 10a

Appendix K — Relevant Statute ..... 24a

## TABLE OF CITED AUTHORITIES


CASES — *Page*

*ACP v. City Council*,
62 P.3d 317 (N.M.App. 2002) ..... 9

*Arnel Dev. Co. v. City of Costa Mesa*,
620 P.2d 565 (Cal. 1980) ..... 22

*Atkins v. Parker*,
472 U.S. 115 (1985) ..... 17

*American Mfg. Mut. Ins. Co. v. Sullivan*,
526 U.S. 40 (1999) ..... 23

*Bd. of Regents v. Roth*,
408 U.S. 564 (1972) ..... 15

*City of Eastlake v. Forest City Enterprises, Inc.*,
426 U.S. 668 (1976) ..... 22

*Cleveland Bd. of Educ. v. Loudermill*,
470 U.S. 532 (1985) ..... 16, 17

*Cloutier v. Town of Epping*,
714 F.2d 1184 (1st Cir. 1983) ..... 23, 24

*Club Misty, Inc. v. Laski*,
208 F.3d 615 (7th Cir. 2000) ..... 20

*Cormack v. Settle-Beshears*,
474 F.3d 528 (8th Cir. 2007) ..... 34

*Cited Authorities*

*Page*

*Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83 (2nd Cir. 2002) ..... 27

*Eacret v. Bonner Cty.*, 86 P.3d 494 (Idaho 2004) ..... 21

*Emmett McLaughlin Realty, Inc. v. Pima Cty.*, 132 P.3d 290 (Ariz.App. 2006) ..... 22

*Harris v. Cty. Of Riverside*, 904 F.2d 497 (9th Cir. 1990) ..... 22

*Hume v. Franklin Cty. Fiscal Ct.*, 276 S.W.3d 748 (Ky. 2008) ..... 21

*Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989) ..... 20

*Keating v. Neb. Public Power Dist.*, 562 F.3d 923 (8th Cir. 2009) ..... 34

*LC&S, Inc. v. Warren Cty. Area Plan Comm'n*, 244 F.3d 601 (7th Cir. 2001) ..... 19, 33

*Landmark Land Co. of Okla. v. Buchanan*, 874 F.2d 717 (10th Cir. 1988) ..... 21, 34

*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) ..... 17

*Cited Authorities*

*Page*

*Mathews v. Eldridge*,
424 U.S. 319 (1976) ..... *passim*

*McKinney v. Pate*,
20 F.3d 1550 (11th Cir. 1994) (en banc) ..... 34

*McPherson Landfill, Inc. v. Bd. of Cty. Comm'rs*,
49 P.3d 522 (Kan. 2002) ..... 21

*Memphis Light, Gas and Water Div. v. Craft*,
436 U.S. 1 (1978) ..... 15, 17

*Miller v. City of Albuquerque*,
554 P.2d 665 (N.M. 1976) ..... *passim*

*Nat'l Park Hospitality Ass'n v. Dep't of Interior*,
538 U.S. 803 (2003) ..... 27

*O'Neill v. Town of Nantucket*,
711 F.2d 469 (1st Cir. 1983) ..... 20

*Parratt v. Taylor*,
451 U.S. 527 (1981) ..... 3, 32, 35

*P.N.M. v. N.M.P.S.C.*,
808 P.2d 592 (N.M. 1991) ..... 27

*River Park, Inc. v. Country Club Estates, Ltd.*,
23 F.3d 164 (7th Cir. 1994) ..... 19, 20, 33

*Cited Authorities*

*Page*

*Rogin v. Bensalem Twp.*,
616 F.2d 680 (3rd Cir. 1980) ..... 20

*San Remo Hotel v. San Francisco*,
545 U.S. 323 (2005) ..... 14, 30

*Taylor Investment, Ltd. v. Upper Darby Twp.*,
983 F.2d 1285 (3rd Cir. 1993) ..... 27, 29

*Tri-County Paving, Inc. v. Ashe County*,
281 F.3d 430 (4th Cir. 2002) ..... 21

*U.S. v. James Daniel Good Real Property*,
510 U.S. 43 (1993) ..... 32

*Wait v. City of Scottsdale*,
618 P.2d 601 (Ariz. 1980) ..... 21

*Ward v. Village of Monroeville*,
409 U.S. 57 (1972) ..... 33

*Wax'n Works v. City of St. Paul*,
213 F.3d 1016 (8th Cir. 2000) ..... 34

*Williamson County Reg. Planning Comm'n v. Hamilton Bank*,
473 U.S. 172 (1985) ..... *passim*

*Zinermon v. Burch*,
494 U.S. 113 (1990) ..... 25, 31, 32, 35

*Cited Authorities*

*Page*

STATUTES

42 U.S.C. §1983 ..... *passim*

NMSA 1978 §56-8-4(D) (2004) ..... 12

CITY OF ALBUQUERQUE RESOLUTION 270-1980 ..... *passim*

OTHER AUTHORITY

Gressman, Shapiro, *et al.*, Supreme Court Practice (9th ed. 2007) ..... 13

## STATUTORY PROVISIONS INVOLVED

City of Albuquerque Resolution 270-1980, Code of Resolutions §1-1-2, is set out at Respondent's Appendix (Resp. App.) 24a.

## INTRODUCTION

This case does not come close to meriting review by this Court. Some of the issues that Albuquerque seeks to present were not properly preserved in the New Mexico courts. Those courts did not make the broad Federal rulings that the City claims. The decision of the New Mexico Court of Appeals—which followed fourteen years of litigation—is highly fact-bound. New Mexico's land use law, on which the decision rests, is unusual. The City identifies no genuine conflict with any decision of this Court, the federal courts of appeals, or state Supreme Courts. And the "unusual circumstances of this case", Pet. App. 27a-28a, are not likely to arise again. In short, the petition fails to satisfy any of the criteria for a grant of certiorari.

New Mexico, unlike most states, recognizes a property right to continued zoning unless a city meets a burden of proving specific factual conditions. When a city seeks to "spot" downzone—where new "restrictions are limited to identifiable properties and are not general policy decisions that apply broadly," Pet. App. 63a-64a—the property owner has a right to continuation of existing zoning unless the city proves the grounds for downzoning in a quasi-judicial process. As such, spot-downzonings represent a narrow class of proceedings, conducted with enhanced procedural protections not required in New Mexico legislative zoning actions, because of the state-created interest in continued zoning. *Id.*, 63a-64a,67a-69a.

In this case, Respondent Albuquerque Commons Partnership ("ACP") proposed a lawful project in 1994 for leased land. The City targeted ACP's site for spot-downzoning, adopting new rules that prevented any economically viable use. The most economic development that remained permissible would have left ACP with a loss of $60 million. This forced ACP to abandon its project and leave its land vacant. ACP lost more than $8 million in guaranteed lease payments before it could cancel its lease. The City refused to provide ACP a hearing or make findings on the conditions for downzoning its site as required under state law, and instead proceeded *as if* it was a legislative matter. After ACP was no longer leaseholder the City amended the zoning to again allow development—reversing many of the specific restrictions it had imposed on ACP.

The District Court reversed the downzoning after several years of litigation, and set ACP's §1983 claim for trial. In a 2003 trial, the jury found the City's spot-downzoning denied ACP procedural due process.

The New Mexico Supreme Court held that "substantial evidence at trial" showed that the City's zoning actions "were directed specifically toward ACP and were not public policy matters of a general character." Pet. App. 71a. The Supreme Court held that under New Mexico law and the factual history of this case, ACP should have had a quasi-judicial hearing in which "the council does not sit as a mini-legislature * * * but instead must act like a judicial body" and that "specific factual findings relating to the affected properties" are required. *Id.*, 64a. Thus, the law of the case contradicts the City and *amici*'s claim that the

downzoning of ACP's site was a "standard legislative process," "routine land regulation case" or "run of the mill" dispute. Pet. 11; N.M. Mun. League Am. Br. ("Am. Br.") 4,12. Consequently, this case does not present a factual or legal basis for certiorari on the first question presented, whether standard legislative rezonings can violate due process.

The Supreme Court did not reach the City's challenge to the §1983 due process judgment. On remand concerning the §1983 verdict, the Court of Appeals held that the failure to provide a quasi-judicial hearing did not by itself determine whether ACP was denied due process. Instead, the court carefully examined the process actually provided and concluded that it did not meet the requirements in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that the City's purportedly "legislative" proceedings were not random and unauthorized as provided in *Parratt v. Taylor*, 451 U.S. 527, 537-538 (1981), and that the verdict was supported by substantial evidence. Pet. App. 7a-28a. The Supreme Court denied a City request for review of the §1983 verdicts.

Petitioner now claims that the deprivation of ACP's state-created property right in continued zoning cannot as a matter of law violate procedural due process because the City effectuated the deprivation using the *form* of a legislative process. Petitioner did not seek certiorari on that basis in the New Mexico Supreme Court and, in fact, claimed in state court that whether the procedure provided to ACP satisfied due process was a factual question for the jury. It has therefore waived that argument. And although the City now pretends the decision below conflicts with an array of

state and Federal decisions, those supposed conflicts are illusory because they are based only on comparing the ultimate results without regard to whether there was in those cases an underlying property right like that existing under New Mexico law in this case, and without consideration of this Court's three-part test in *Mathews*.

After fourteen years of litigation ACP has yet to receive the $8 million in out-of-pocket expenses incurred in the 1990's and awarded by the jury in 2003. The state proceedings have resulted in three state Court of Appeals decisions and one Supreme Court opinion based on the issues raised, unique facts, and New Mexico's particular rules on spot-downzonings. The City has demonstrated no basis for further review by this Court.

## STATEMENT OF THE CASE

### I. Facts Relevant to the Petition

Respondent ACP held a long-term lease with annual payments of $1.32 million. ACP's site was governed by the 1981 Uptown Sector Plan (1981USP). In 1994, ACP entered into an agreement with the lessor to develop the site and eliminate five years of lease payments, resulting in savings for ACP of $8 million. The agreement was subject only to City site plan approval.

ACP proposed a project, then withdrew the plan for revision. Before ACP submitted its revised plan, City staff and Councilors developed strategies to delay and deny the project. A staff memo to a Councilor discussed tactics for opposing ACP's project, including "short-circuiting the authorized sector planning process," "[w]hether a moratorium would successfully block some of the retail uses which might not be desired," and ways to deny the ACP's plan. Trial Exh. C-2. Shortly after a

Councilor again met with staff, the City Council *directed* the Planning Department to revise the 1981USP by April 1995. Trial Exh. 4.[1]

ACP submitted a second site plan. "The record shows that" this plan, though in need of "some adjustments," "complied with the requirements of the 1981 Uptown Sector Plan and was no different from a number of projects that the City had previously allowed under that sector plan." Pet. App. 80a. The City deferred hearings on ACP's plan and then, 1½ hours before a hearing, adopted a moratorium on Uptown plans. Only ACP had an Uptown plan pending.

While ACP's project was being delayed, the City "rushed" the zoning revision process. Pet. App. 70a-71a. Reviewing the record, the New Mexico Supreme Court concluded that "the City felt it necessary to stall consideration of ACP's permit and hastily amend the original sector plan." *Id.*, 71a.

In its Petition the City claims it adopted the 1995 Uptown Sector Plan (1995USP) to create "a true urban center," citing the Court of Appeals 2006 decision. Pet. 4. But the Supreme Court reversed that decision, finding the new zoning limitations did not even apply throughout Uptown but were confined to six percent of the area, affecting only three owners, "primarily ACP." Pet. App. 50a,69a.

The 1995USP split the existing 1981USP zone into two new sub-zones: the "Intense Core" and "Outside of Intense Core". The "Intense Core" had far more

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1. The City falsely states that its Planning Department, and not the Council itself, initiated the revisions. Pet. 4.

restrictive rules than the 1981USP or the "Outside of Intense Core". Pet. App. 49a-50a,70a-71a n.5. "Intense Core" restrictions were tailored to affect only ACP, while exempting existing Uptown businesses in the Intense Core. *Id.*, 70a,74a-75a.

These changes amounted to a spot-downzoning of ACP's property that required justification by the City based on criteria in *Miller v. City of Albuquerque*, 554 P.2d 665 (N.M. 1976), and the City's own Resolution 270-1980 ("R270-1980") adopting *Miller*. Pet. App. 71a-72a; Resp. App. 24a. *Miller* held that, under New Mexico law, rezoning of property to a more restrictive use requires proof "that either there was a mistake in the original zoning or that a substantial change has occurred in the character of the neighborhood since the original zoning to such an extent that the reclassification or change ought to be made." 554 P.2d at 668.

The City did not present any justification for the downzone. Pet. App. 65a-66a,71a-72a,76a. Instead, it chose to effectuate the spot-downzoning in the *form* of a legislative proceeding, ignoring both the required findings and standards of *Miller*/R270-1980, limiting evidence, cross-examination, time for presentations and questioning, allowing lobbying, and making no effort to provide ACP with an impartial tribunal by limiting *ex parte* contacts with Councilors. *Id.*, 66a-67a & n. 3. A Councilor even changed her position after a constituent contacted her telling her to do so. *Id.*, 24a. As found by the Court of Appeals, this was a "political process chosen by the City as its official act to effectuate the deprivation of ACP's property." *Id.*, 27a. Accordingly, this case is in no way comparable to the trivial errors that *amici* speculate could be abused in some imaginary due process claim. Am. Br. 7-8.

The 1995USP restrictions imposed requirements such that to build its project, ACP would have had to also build *1.8 million* feet of office space when there was only 1.9 million feet of office in *all* of Uptown. Uncontradicted evidence showed that *no project* allowed by the 1995USP on ACP's site was economically feasible. The most economic project required a loss of over $60 million. 2/7/03 Trial Transcript 101-107.

ACP sought a variance from the 1995USP, which the City denied. ACP also requested a hearing on the City's indefinite deferral of its site plan, which was denied as well, as was a request for reconsideration and an attempted appeal. After ACP made its last guaranteed payment and ended its lease to mitigate losses, the City amended the 1995USP and a development was built by another party. Pet. App. 77a.

The City states that hearings were held on the 1995USP. Pet. 5. However, the City Council *never* held a hearing on whether there was evidence meeting *Miller*/R270-1980 that would justify downzoning ACP's site. ACP repeatedly requested such a hearing but the City, with advice of counsel, denied it was downzoning ACP's property and proceeded as if it was a legislative matter applicable to the entire city or sector. Pet. App. 66a. Thus the City was not, as *amici* profess, "ambushed" but rather was exposed in its strategy to unlawfully spot-downzone ACP's site in the guise of a legislative action.

The City claims the Council "found" that Uptown affects the entire City and impacts safety and air quality, quoting the Court of Appeals 2006 decision. Pet. 5. But the Supreme Court reversed, ruling that "the City made *no findings at all*, let alone any specific findings of fact

and explanation of how those facts justified the amendments under the *Miller* and Resolution 270-1980 criteria." Pet. App. 67a (emphasis added). Instead, "[r]egardless of how the City tries to construe its actions, substantial evidence at trial showed that the 1995 Uptown Sector Plan Intense Core restrictions were directed specifically towards ACP and were not public policy matters of a general character." *Id.*, 71a.

## II. Proceedings Below

The City denigrates extensive judicial review proceedings that produced a 2,356 page record. Pet. App. 146a-147a. Immediately after the 1995USP was adopted, ACP sought review under state law in state court, requesting invalidation of the spot-downzoning and an order compelling the City to review ACP's project under the 1981USP ("First Administrative Appeal"). *Id.*, 52a. ACP sought inverse condemnation damages under state law, and 42 U.S.C. §1983 damages for denial of procedural due process and a compensable taking.

Judge Conway ruled the City had downzoned ACP's property without making the necessary showing under *Miller*/R270-1980. Resp. App. 4a;[2] Pet. App. 140a-144a. Judge Conway ruled the City improperly treated the 1995USP as a legislative text amendment rather than a zone change, denying ACP a quasi-judicial review by an impartial decision maker. Resp. App. 4a; Pet. App. 144a. Judge Conway ordered review of ACP's project under the 1981USP. Pet. App. 52a.

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2. This Order constitutes Judge Conway's ruling, not the informal letter to counsel sent a year earlier that the City provided to this Court. Pet. App. 146a-152a. Judge Conway later revised a portion of this Order to allow ACP's takings claims to go to the jury. Conway Record 3300-3301.

On remand, the City denied approval of ACP's project and ACP appealed ("Second Administrative Appeal"). Judge Lang reversed, holding the City had not considered ACP's project under the 1981USP as directed by Judge Conway, that the project met 1981USP criteria "as admitted and announced by at least two members of the Respondent Council in rejecting Petitioner's appeal," and ordered the City to approve it. Resp. App. 8a-9a. The City appealed, but the appeal was ruled premature. *ACP v. City Council*, 62 P.3d 317 (N.M.App. 2002).

The trial court ruled ACP had exhausted its administrative remedies and that further attempts to appeal the indefinite deferral of its project were futile. Resp. App. 4a-5a. The trial court granted summary judgment to the City on ACP's inverse condemnation claim, and later held the City was judicially estopped from contending ACP had a state law remedy. Conway Record 3300-3301.

As sought by the City, ACP's §1983 due process and takings claims were sent to the jury. After a two-week trial in 2003, the jury found for ACP. On the due process claims, the jury found the City denied ACP an opportunity for a meaningful hearing and an impartial tribunal on the downzoning. On the takings claims, the jury found the downzoning did not substantially advance the City's legitimate interests and denied all economically beneficial uses of ACP's property. The jury awarded damages of $8,349,095 on each of the due process claims, representing ACP's out-of-pocket costs, and $6,000,000 on the takings claims. ACP elected judgment of $8,349,095 to prevent double recovery.

The City appealed the judgment and sought certiorari in the Court of Appeals on the two administrative appeals. The court consolidated the appeals and reversed, Pet. App. 54a, holding that adoption of the 1995USP was a legislative act because the 1995USP did not "solely" burden ACP and was not adopted "solely" in response to ACP. *Id.*, 98a-102a The court held adoption of the Intense Core was a rezoning by text, not map, amendment, and *Miller*/R270-1980 only applied to zone map changes. *Id.*, 102a-107a,118a-123a,127a-131a. The court ruled the 1995USP was not a downzoning. *Id.*, 123a-126a.

ACP moved for rehearing. The court appended an order reversing the takings verdicts on the ground that ACP's project could not have been approved under the 1981USP. Pet. App. 135a-139a.

The New Mexico Supreme Court granted certiorari, reversed the Court of Appeals, and affirmed Judge Conway's decision on the First Administrative Appeal, ruling the 1995USP downzoned ACP's property and required justification under *Miller*/R270 1980. Pet. App. 71a-72a,75a-76a. The court ruled that the City had failed to supply that justification and that adoption of the 1995USP was a quasi-judicial action that should have been conducted with enhanced procedural protections. *Id.*, 64a-66a,71a-72a,76a. On the Second Administrative Appeal, the court held Judge Lang's authority to order the City to approve ACP's plan was moot. *Id.*, 76a-77a. The court reversed dismissal of the takings claim, concluding that ACP's plan complied with the 1981USP and remanded for consideration of remaining issues concerning the §1983 claim and the takings verdict. *Id.*, 78a-81a.

On remand, the Court of Appeals held ACP had a property interest under New Mexico law in continuation of its existing zoning unless a spot-downzoning was justified under *Miller*/R270 1980 and that this state-created interest was constitutionally protected. Pet. App. 6a-17a. The Court ruled that ACP's due process claim was ripe and the City's failure to provide an impartial tribunal constituted a deprivation of ACP's property without procedural due process. *Id.*, 17a-30a. The court held a §1983 action was not foreclosed by available state remedies because the deprivation of ACP's property interest was not the result of a random and unauthorized act, but "that the flawed process was selected and endorsed as an official act of the whole governmental power of the City" and there was substantial evidence to support the jury's verdict. *Id.*, 24a. The court affirmed the damages award and attorney's fees and costs, reversed the trial court's award of post-judgment interest, and did not reach the takings verdict. *Id.*, 3a-4a,22a-26a,27a-28a,30a-44a.

The City sought, but was denied, certiorari review on narrow grounds in the New Mexico Supreme Court. Pet. App. 153a. ACP also sought certiorari on the availability of post-judgment interest, which was granted and remains pending. Resp. App. 1a-2a. These developments go to this Court's jurisdiction and are discussed immediately below.

## JURISDICTION

### I. This Case Is Still Pending In The New Mexico Supreme Court

The City fails to inform this Court that ACP was granted a writ of certiorari by the New Mexico Supreme Court on July 1, 2009. Resp. App. 1a-2a. The question pending in that proceeding is whether post-judgment interest on a §1983 judgment against the City is barred by statutory immunity in NMSA 1978, §56-8-4(D) (2004), and involves issues of New Mexico and Federal law. See Petition for Writ of Certiorari 1-2 (5/26/09).

The City also fails to inform this Court that on July 22, 2009 it filed an Emergency Motion for Clarification in the New Mexico Supreme Court, seeking a ruling as to whether the denial of the City's petition for certiorari and grant of ACP's petition "resulted in a final order from which a petition for writ of certiorari to the United States Supreme Court may be taken." Emergency Motion 1-2. The City stated it was "difficult to determine" whether the state Supreme Court's orders were "final" and that this is "one of the twilight zone cases because it embodies factors that weigh both in favor of and against 'finality' for purposes of further certiorari review." *Id.*, 3,6. ACP responded that this Court's jurisdiction is properly resolved in this Court, not state court. *Id.*, 7. On August 19, 2009 the Emergency Motion was denied without opinion in an unreported order.

## II. Questions Presented by the City Were Not Preserved by the City's Petition for Writ of Certiorari to the New Mexico Supreme Court

The City raised only narrow issues when seeking New Mexico Supreme Court review of the §1983 judgment, specifically whether:

> 1. ACP had a constitutionally protected property interest, Resp. App. 11a, 15a-17a;
>
> 2. State law was adequate to "correct" the City's procedural deficiency, *id.*, 11a, 18a-21a;
>
> 3. Deprivation of ACP's property interest was "complete," *id.*, 11a, 21a-22a; and
>
> 4. Under New Mexico law *ex parte* contacts constitute disqualifying bias, *id.*, 11a, 22a-23a.

The City did ***not*** contend that the Court of Appeals had incorrectly held that the 14th Amendment requires a "quasi-judicial hearing" on a rezoning, or that an owner may assert a §1983 procedural due process claim without pursuing available state law remedies. The City thus failed to preserve the expansive Federal questions it attempts to raise in this Court. See Gressman, Shapiro, *et al.*, Supreme Court Practice 192 (9th ed. 2007) ("Failure to follow the appellate channels provided by the state is usually fatal to the chances for Supreme Court review").

## ARGUMENT

The City seeks review of issues that it did not preserve and challenges supposedly "expansive" rulings that were either not made at all or that were closely limited to the facts and to New Mexico law. The decision below is unexceptional, based on the application of New Mexico law and well-established precedent of this Court to unusual facts. As this Court observed in *San Remo Hotel v. San Francisco*, 545 U.S. 323, 347 (2005), "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions" and indeed "have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." That observation is fully borne out in the careful decisions rendered by the New Mexico courts over more than a decade of litigation. Petitioner has shown no need for this Court's intervention.

### I. Review Is Not Warranted Because The Court Of Appeals Applied Well-Settled Law To An Unusual State-Law Property Interest In Continued Zoning And To Facts That Are Not Likely To Recur

At the heart of the decisions below is the New Mexico rule that spot-downzoning may be undertaken only on proof of criteria meeting the *Miller*/R270-1980 "change or mistake" rule. That rule – essentially "cause" in the downzoning context – is a uniquely state law zoning doctrine. The Petition recognizes zoning as "the quintessential state activity of regulation of property use in the public interest" Pet. 10, yet does not once cite *Miller*, or even R270-1980, codifying *Miller* as Albuquerque law.

The Court of Appeals analyzed the *Miller*/R270-1980 right under Federal constitutional law to determine "whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." Pet. App. 6a quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 10 (1978). The court determined that ACP had a state-created property interest in the continuation of its existing zoning unless the City proved a recognized *Miller*/R270-1980 "cause" for a spot-downzoning, and that ACP's property interest is constitutionally protected. *Id.*, 6a-17a. The City does not challenge the court's confirmation of ACP's constitutionally protected property interest. Pet. 8.

Having recognized ACP's constitutionally protected state-law interest under *Miller*/R270-1980, the Court of Appeals applied the familiar analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976). It carefully analyzed the *Mathews* factors to conclude that due process required that the City provide ACP a hearing in an impartial tribunal on the issue of whether the spot-downzoning criteria were satisfied before implementing a downzone. Pet. App. 18a-21. The City does not challenge the court's analysis under *Mathews*.

Accordingly, this case does not, as the City asserts, raise fundamental or recurring issues regarding the legislative authority of local governments. Pet. 3. It simply involves the application of well-settled principles recognized long ago in *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), and *Mathews* to "rare" and "unusual circumstances" in which ACP proved it was deprived of a state-created zoning interest through procedures found by a jury to be constitutionally inadequate, in a verdict supported by substantial evidence. Pet. App.

24a,27a. As such, this case merely involves "technical nuances of a state's zoning law" and that state's "heightened concern for procedural protections." Am. Br. 13-14. These "rare circumstances" are not likely to recur and do not warrant this Court's attention.

### A. The Decision Below Reflects State Law Property Interests in Zoning

There is no conflict between the narrow, fact-specific decision of the Court of Appeals, based on a New Mexico-created property interest, and the rezoning decisions cited by the City. Pet. 11-13. Those decisions show only that due process requirements do not exist in a vacuum but vary with the contours of state-created property interests. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) ("Property interests are not created by the Constitution" but "'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law'") (quoting *Roth*).

While New Mexico has created a property interest in continued zoning, other states recognize no such interest—which explains the rezoning decisions cited by the City. The varying outcomes in these cases do not reflect conflicts in understanding or applying Federal law, but flow directly from varying state-created property interests, reflecting the diversity of state zoning laws and administrative procedures.

The City seeks to quash this variety of local responses to local conditions by Federalizing zoning law and procedures to impose "national uniformity" by way of the 14th Amendment. This Court should reject the City's unwarranted effort to nationalize zoning law,

which would overturn decades of jurisprudence protecting property interests in fields as diverse as public employment, *Loudermill*, Social Security, *Mathews*, utility service, *Memphis Light, Gas and Water Div'n*, discrimination claims, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) and public benefits, *Atkins v. Parker*, 472 U.S. 115 (1985).

### B. The City Waived its Challenge to the New Mexico Supreme Court's Decision

The City claims the New Mexico Supreme Court's "First Administrative Appeal" decision held that the 14th Amendment's Due Process Clause barred downzoning ACP's site without first providing a quasi-judicial proceeding free from *ex parte* communications. Pet. 11; *see also* Pet. 13 n.2 (Supreme Court "held that the 14th Amendment mandates that all states provide quasi-judicial process in zoning decisions like this one"). Similarly, the City characterizes the court as holding that the City could not, consistent with constitutional requirements, rezone Uptown's Intense Core by means of a standard legislative process. Pet. 11.

These claims are central to the City's first Question Presented, but the City waived this issue by not raising it in its petition for New Mexico Supreme Court review of the Court of Appeals' §1983 decision. The argument now proffered is a complete reversal of the City's position below that the Supreme Court's First Administrative Appeal decision was based upon *state law* requirements, *not* the 14th Amendment as the City now claims. See City Outline of Positions in Advance of Informal Oral Argument at 1 (N.M.App. 2/12/2009) (Supreme Court held "that *state law* required that ACP be afforded a quasi-judicial hearing. The Court did not determine

what federal law required under 42 USC §1983"); *id.* at 3-4 (Supreme Court "did not conclude that a quasi-judicial hearing is *required by the federal constitution*") (all emphases added). In fact, the City cited not one of the decisions that it now claims are in conflict with the decision below when briefing either the First Administrative Appeal in the N.M. Supreme Court or its 2008 Motion for Rehearing in the Court of Appeals.

Given the City's repeated acknowledgment that the New Mexico Supreme Court's decision was based on "state, not federal, law," the City has waived its first Question Presented.

### C. The City Mischaracterizes the Court of Appeals' Decision

The City claims the Court of Appeals "held that a local government's failure to provide a quasi-judicial process presents an immediately cognizable claim under § 1983." Pet. 11. It also asserts that the court held "ordinary legislative process" in zoning cases can violate 14th Amendment due process, and that the City violated ACP's right to due process by such a legislative rezoning. Pet. 2-3. These characterizations are false. The Court of Appeals could not more plainly have stated that the lack of a quasi-judicial process does *not* itself violate due process: "we conclude that the failure to hold a particular type of hearing was not by itself a failure of due process actionable under Section 1983," but that a quasi-judicial hearing was "certainly necessary to satisfy state law." Pet. App. 18a.

False too is the City's assertion that the Court of Appeals held that *ex parte* contacts are inappropriate "because a quasi-judicial process is required by the U.S.

Constitution." Pet. 9. In the very passage cited by the City, the court stated that "a quasi-judicial hearing is *not* required to satisfy due process." Pet. App. 20a (emphasis added).

The jury instruction at trial was consistent with the Court of Appeals' rulings. See Conway Record 3318-19 ("The City's failure to provide a quasi-judicial proceeding and to follow the procedural requirements of state and municipal law does not in and of itself establish a violation of Plaintiff's right to procedural due process"). Given these instructions, the Court of Appeals' rulings, and the City's position below, there is absolutely no basis for the City's current claim that decisions below were based on a notion that failure to provide quasi-judicial procedures, required by New Mexico law, itself violated the 14th Amendment. Further, because the rulings below concerning quasi-judicial actions distinguished state law requirements, there is no conflict with cases cited by the City addressing the issue under Federal law. Pet. 11-13.

### D. The Authorities Relied On By The City Are Readily Distinguishable

*The City relies on irrelevant decisions involving no comparable state law property interest.* The outcomes in *LC&S, Inc. v. Warren Cty. Area Plan Comm'n*, 244 F.3d 601 (7th Cir 2001), and *River Park, Inc. v. Country Club Estates, Ltd.*, 23 F.3d 164 (7th Cir. 1994), differ from the decision below, not because of any conflict in application of Federal law but because in New Mexico, unlike Indiana, an expectation of unchanged zoning law is not only "reasonable", but is well-settled law under *Miller*/R270-1980. See *LC&S*, 244 F.3d at 605 (under Indiana law "an expectation of unchanged zoning

law * * * is not a property right, or even reasonable") (following *River Park*). Far from the New Mexico Court of Appeals acknowledging a conflict with the Seventh Circuit (see Pet. 3), the court below distinguished *River Park* because "ACP had a property right that was to be afforded federal due process protections." Pet. App. 27a.

*Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000), confirms that when state law does create a property interest—there, liquor licenses that were revocable only for cause—the Seventh Circuit, like New Mexico, recognizes the interest is entitled to due process protection. See *Id.* at 619 (holding voter prohibition of liquor sales at particular address deprived liquor licensee of state-created property interest without due process).

The City string cites cases that do not require procedural protections for certain zoning decisions, without discussing the facts or law involved in those cases or whether there was an underlying state-created property interest at stake. Pet. 12-13; see also Am. Br. 11-12 (disregarding ACP's property interest and the New Mexico Supreme Court holding that the spot-downzoning of ACP's site was not a leglislative action). In fact, not one of these cases is remotely comparable to the decision here. See *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989) (no constitutionally protected property interest at issue); *O'Neill v. Town of Nantucket*, 711 F.2d 469 (1st Cir. 1983) (state law treated revocation of license to operate "amusement machines" as a legislative matter); *Rogin v. Bensalem Twp.*, 616 F.2d 680, 693-94 & n.60 (3rd Cir. 1980) (amendment affecting zoning district is legislative but due process applies to denial of building permit applications because "they involved application of the Township's

general zoning policies as manifested in the amendments to a particular parcel of land"); *Landmark Land Co. of Okla. v. Buchanan*, 874 F.2d 717, 723-24 (10th Cir. 1988) (process provided satisfied due process given that plaintiff's interest was in "an unissued permit," the government had not "terminated *possession* of any interest," and there were no improprieties by the decisionmaker); see also *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), cited at Am. Br. 10 (adequate pre-deprivation process was available but not utilized by plaintiff).

*The City relies on irrelevant decisions based on the laws of other states.* The City string cites cases that discuss procedural requirements for rezoning, but those decisions are irrelevant here because they rest on different state laws. See *Wait v. City of Scottsdale*, 618 P.2d 601, 602 (Ariz. 1980) (whether upzoning requested by landowner is legislative or adjudicative is an issue of state law, and under Arizona law is legislative); *McPherson Landfill, Inc. v. Bd. of Cty Comm'rs*, 49 P.3d 522, 524, 534 (Kan. 2002) (citing only Kansas decisions that due process must be complied with in quasi-judicial proceedings; no discussion whether quasi-judicial functions require certain procedures based on Federal law); *Eacret v. Bonner Cty.*, 86 P.3d 494, 498 (Idaho 2004) (citing only Idaho precedent for proposition that zoning decisions applying general rules or specific policies to specific individuals, interests or situations are quasi-judicial and subject to due process); *Hume v. Franklin Cty. Fiscal Ct.*, 276 S.W.3d 748, 751-52 (Ky. 2008) (in Kentucky, review of rezoning assures procedural due process is afforded, providing affected parties an opportunity to be heard at a meaningful time and in a meaningful manner, without bias or prejudicial conduct

demonstrating malice, fraud, corruption, conflicts of interest, or blatant favoritism); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 566-67, 568, 570-71 (Cal. 1980) (decision that zoning ordinances are legislative acts was based on "California doctrine" that "does not violate the federal Constitution"); *Emmett McLaughlin Realty, Inc. v Pima Cty.*, 132 P.3d 290, 294-95 (Ariz.App. 2006) (concluding owner was not entitled to notice of a zoning decision "[b]ased on *Arizona law* concerning the legislative act doctrine," citing only Arizona decisions, and carefully distinguishing *Harris v. Cty. of Riverside*, 904 F.2d 497 (9th Cir. 1990), with which the City claims *McLaughlin* conflicts).

This Court's decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 n.13 (1976), with which the City claims a conflict, is also readily distinguishable. There the Court contrasted the plaintiff's attempt to upzone property from zoning action "denigrating the use or depreciating the value of land," explaining that in the former case "[n]o existing rights are being impaired"; rather, "new use rights are being sought," "free from the restrictions attached to the land when it was acquired." *Eastlake* thus stands in stark contrast to the facts here, where ACP was subjected to such extreme downzoning that the jury found it left no economically viable use for ACP's site. Furthermore, *Eastlake* rests, this Court observed, on a "binding interpretation of state law" that upzoning was legislative in nature. *Id.* at 673-674 & n. 9. Here, of course the New Mexico Supreme Court ruled under state law that the downzoning of ACP's site was *not* legislative action. Pet. App. 62a-64a,69a-72a.

In short, the City's cases are not in conflict on issues of Federal law, but reflect either the absence of a state-created property interest or decisions based on state law. In *amici*'s words, "these inconsistent views reflect purely local perspectives on land use regulation." Am. Br. 13. Such divergent perspectives are entirely appropriate in "the quintessential state activity of regulation of property." Pet. 10.

### E. The Court of Appeals Correctly Applied *Mathews* To A State-Created Property Interest

The Court of Appeals properly analyzed ACP's due process claim applying this Court's well-established precedent. The Court of Appeals first determined that ACP was deprived of its constitutionally protected state-law interest under *Miller*/R270-1980. See *American Mfg. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'"). It then carefully analyzed the three factors set forth in *Mathews v. Eldridge*, concluding that on balance they weighed in favor of requiring a hearing before an impartial tribunal on the issue of whether spot-downzoning criteria were met before implementing a downzone. Pet. App. 18a-21.

The City does not challenge the Court of Appeals' analysis under *Mathews*. Instead, it refers to *Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983), which applied *Mathews* to revocation of a sewer permit by two commissioners several days after the permit was issued by a third commissioner, ruling the permittees had received procedural due process and that, even if they had not, any claim was barred by *res judicata*.

*Id.* at 1191-1192 & n. 7. There is no *res judicata* issue in the present case, and the application of flexible due process requirements to the facts in *Cloutier* does not conflict with the application of *Mathews* to far different facts here.

### F. The Petition Raises No Substantial Federal Issue

The State was not required by Federal law to adopt the *Miller*/R270-1980 rule or to recognize a property interest in continued zoning absent proof of *Miller*/R270-1980 criteria, just as states are not required to recognize property interests in continued public employment or utility service. But once such interests are created, they are protected by due process, as the decision below recognized. This may result in varying outcomes in land use disputes in different states, but this simply reflects the rich diversity of rights under state law that, once established, are subject to protection under the Federal framework of *Mathews v. Eldridge*. See Am. Br. 9 ("the Fourteenth Amendment identically applies to all municipalities").

The Court of Appeals ruling does not, as the City claims, raise a "fundamental and recurring issue regarding the authority of local governments to regulate the use of property within their jurisdiction by legislative action." Pet 3. The New Mexico Supreme Court unequivocally held the spot-dowzoning of ACP's site was not a legislative action. Pet. App. 62a-64a,69a-72a. Rather, this case presents the "unusual circumstance" that ACP had a state-created constitutionally protected interest in continued zoning, and the "rare circumstance" that ACP proved it was deprived of that interest through procedures a jury found were

constitutionally inadequate, and substantial evidence supports that verdict. *Id.*, 24a,27a. Far from presenting a "recurring issue," this case presents unique circumstances that are unlikely to recur and do not warrant this Court's attention.

## II. Neither The Facts Nor The Holdings Of The New Mexico Courts Raise A Conflict With This Court's Decisions Requiring Use Of State Procedures In Certain Cases

The City's second argument does not identify any specific holding for review by this Court. Instead, the City strings together unrelated quotations from other courts concerning a range of ripeness and exhaustion issues. This blunderbuss approach cannot substitute for specification of error below, and is immaterial because the City abandoned any ripeness or exhaustion claims when it sought certiorari from the New Mexico Supreme Court without raising these issues.[3] Further, the underlying premise of the City's argument—that ACP did not pursue state law remedies—is false. ACP successfully obtained relief available under New Mexico law, but that relief could not "cure" the City's unconstitutional action.

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3. The City sought *certiorari* in the New Mexico Supreme Court on a claim that deprivation of ACP's property was not "complete" under *Zinermon v. Burch*, 494 U.S. 113 (1990), Resp. App. 11a, but abandoned that claim in this Court.

### A. The City Has Not Identified The Court of Appeals Ruling It Challenges

The City's second argument for certiorari rests on the fantasy that the Court of Appeals decided "that a property owner need not pursue state law remedies before proceeding under Section 1983." Pet. 19. The City does not identify the ruling it attributes to the Court of Appeals—because the court reached no such decision. In fact, although the City cobbles opinions from other courts concerning exhaustion or ripeness, it gives virtually no attention to the actual decision below, quoting just a sentence fragment from the Court of Appeal's ruling that explains why ACP's due process claims are not co-extensive with its takings claims. Pet. 21, quoting Pet. App. 29a. The City has not demonstrated the Court of Appeals' decision is in conflict with any other court's ruling because the City has not identified with specificity any ruling by the Court of Appeals that it challenges.

### B. The City Has Not Preserved Its Ripeness Argument

The City repeatedly cites *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), but the City abandoned its ripeness argument. The City's *only* ripeness argument in the Court of Appeals was that ACP's due process claim was not ripe because it was coextensive with the takings claim and ACP did not pursue compensation for a *taking* under state *condemnation law*. Pet. App. 28a; City Court of Appeals Brief-in-Chief 40. The Court of Appeals rejected the City's argument because ACP's due process and takings claims are not co-extensive, and the City did not claim otherwise to the New Mexico Supreme

Court. Pet. App. 28a-29a; Resp. App. 11a. The City therefore waived the *only Williamson County* argument raised in the Court of Appeals, and the City's vague and confused new ripeness theories were never raised below.[4]

The reliance of the City and *amici* on *Williamson County* and other federal court decisions is fundamentally misplaced because the ripeness requirement in *all* of their cases arises from the Article III case or controversy requirement and Federal prudential concerns. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-8 (2003). This was explicitly recognized in *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2nd Cir. 2002) and *Taylor Investment, Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1290 n. 6 (3rd Cir. 1993), both cited by *amici*. But Article III is not applicable to state courts and there is no identical provision in New Mexico law, where ripeness is determined using Federal rulings only as a "guide." *P.N.M. v. N.M.P.S.C.*, 808 P.2d 592, 600 n. 3 (N.M. 1991).

The Court of Appeals did not reach the distinction between Federal and state ripeness. Pet. App. 28a-29a. The City did not raise the issue in the state Supreme Court, and does not even acknowledge the problem in this Court. Because the ripeness of ACP's claims for state court adjudication is an issue of New Mexico law that was not decided below or preserved by the City,

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4. Similarly, the trial court ruled that the City, having obtained dismissal of ACP's inverse condemnation claim, was judicially estopped from claiming ACP had a state law remedy, and the City did not appeal that ruling.

this case is not an appropriate vehicle for review of the second Question Presented.

Even if the City's second argument was applicable and had been preserved, it would not warrant this Court's attention. *Williamson County* held claims were not ripe when a landowner failed to pursue variances to obtain a final decision on how property could be developed, and had not pursued state inverse condemnation proceedings. 473 U.S. at 186. This Court held the claims were not ripe whether framed as a taking or a substantive due process violation. *Id.* at 197-200. In the present case, unlike *Williamson*, ACP sought but was denied a variance; ACP sought but was denied administrative appeals of its site plan and the trial court held further administrative appeals would be futile; and the Court of Appeals followed Tenth Circuit law in ruling that ACP's due process and takings claims were not co-extensive. The City has not challenged these rulings. Further, the City itself obtained dismissal of ACP's inverse condemnation claim, and was later ruled by the trial court to be judicially estopped from contending ACP had a state law remedy. Conway Record 3300-3301. The City did not appeal that estoppel ruling either.

It is abundantly clear that ACP had received a final, definitive decision from the City "regarding how it [would] apply the regulations at issue to the particular land in question." 473 U.S. at 190. ACP thus satisfied the underlying purpose of ripeness of assuring that the decisionmaker reached a definitive position that inflicted an actual, concrete injury. *Id.* at 193. Although *Williamson* is inapplicable to either state court or procedural due process claims, its requirements were met nonetheless.

The reliance of the City and *amici* upon *Williamson County* in this procedural due process case reflects a misunderstanding of that decision, and a confusion of ripeness with state "remedies" that provide "opportunity" to "fix mistakes." Am. Br. 5, 7-9. *Williamson County* detailed the difference between (i) the requirement, for ripeness, of a definitive administrative action before a taking or substantive due process claim may be asserted, and (ii) exhaustion of administrative remedies, which *Williamson* reaffirmed is *not* required before a §1983 action. 473 U.S. at 193. *Williamson* made clear that owners need not exhaust state review of the validity of an adverse zoning action:

> respondent would not be required to resort to those procedures before bringing its 1983 action, because those procedures clearly are remedial. Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking.

*Id. Taylor Investment*, 983 F.2d at 1290 n. 6, cited by *amici*, emphasized that ripeness "does not require state court review" of administrative zoning decisions.

The New Mexico judicial review remedies that the City and *amici* claim –falsely – ACP did not utilize are precisely the type of "remedial" "appeal" procedures providing "review" to "fix mistakes" that under *Williamson County* need not be exhausted. The decision below is completely consistent with *Williamson County*.

The City argues that *Williamson County* "makes clear" that "the Constitution permits a state to take a citizen's property outright and provide due process afterward." Pet 20. But the City gives no citation for this imagined holding. There is no such ruling in *Williamson*, which concerned "just compensation" after a taking, *not* a post-deprivation hearing after a deprivation of property.

The City sees a "corollary" of *Williamson County* "that the Constitution does not require a state to provide pre-deprivation process for property zoning actions that do not rise to the level of a taking." Pet. 19-20. Again, the City gives no citation for this imagined "corollary," which is counter to *Williamson's* differentiation of due process from takings. 473 U.S. at 195 n. 14 ("Unlike the Due Process Clause, however, the *Just Compensation Clause* has never been held to require pretaking process or compensation.") Four Justices doubted in *San Remo* "that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." 545 U.S. at 349 (Rehnquist, C.J, concurring, joined by O'Connor, Kennedy, and Thomas, JJ). Given that doubt, the vast expansion of *Williamson County* that the City seeks here, to reach beyond the takings area, is untenable.

### C. ACP Pursued Available State Remedies

Despite the clear evidentiary record to the contrary, the City claims "ACP rejected state law remedies to correct the procedural violation." Pet. 20; see also Pet. 3 (ACP "rejected available state law remedies."),

Am. Br. 8-9. Nothing could be further from the truth. Administratively, ACP sought a variance and appeal of its "deferred" site plan. Unlike most plaintiffs in §1983 zoning cases, ACP successfully pursued state law judicial review through two separate cases, both resolved in ACP's favor and affirmed by the state Supreme Court. App. 81a,76a-77a,79a-80a.

Rather than "reject state law remedies", ACP obtained these remedies to reverse the City's unlawful downzoning and the City's refusal to comply with a lawful court order invalidating that downzoning. Because ACP obtained favorable state law rulings, there is no factual basis for the City's arguments premised on an imagined rejection of state remedies, or the City's claim that this case presents an opportunity to bar due process claims "until state law remedies are pursued." Pet. 23.

The City complains that ACP "rejected" a remand to the City for a quasi-judicial hearing on the downzoning. Pet 20-21. The downzoning was not remanded because Judge Conway ruled in ACP's favor, *on the merits*, that the City failed to prove downzoning criteria, and the decision was affirmed. Pet. App. 76a. ACP "rejected" a remand only if a party that prevails on summary judgment could be said to have thereby "rejected" a trial.

While ACP utilized available state remedies, those remedies do not substitute for a meaningful and impartial pre-deprivation hearing. The Court of Appeals carefully followed *Zinermon v. Burch*, 494 U.S. 113 (1990), which made clear that whether the Constitution requires a pre-deprivation hearing is determined by weighing the *Mathews* factors, which usually "requires some kind of hearing *before* the State deprives a person

of liberty or property." Pet. App. 24a-25a (quoting *Zinermon*, emphasis in original). *Zinermon* recognized that in some limited circumstances – where a pre-derivation hearing is not feasible because a deprivation is random or unauthorized or a hearing is burdensome in proportion to the interest involved – "a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." 494 U.S. at 128.

The Court of Appeals correctly applied *Mathews* and *Zinermon* to the unusual facts of this case, recognizing that a pre-deprivation hearing was feasible because the City's actions were intentionally taken by the Council and were neither random nor unauthorized. Pet. App. 18a-25a. As in *Zinermon*, but unlike the situation in *Parratt*, ACP could have, but "did not receive an impartial tribunal and that the flawed process was selected and endorsed as an official act of the whole governmental power of the City." *Id.*, 24a-26a.

The court's application of *Zinermon* is completely consistent with *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (exceptions to the general rule requiring pre-deprivation notice and hearing are tolerated only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."). Not only were there no "extraordinary situations" to justify a post-deprivation hearing here, but there was no opportunity for *any* post-deprivation *hearing* on the downzoning. The City and *amici* point only to a possible remand following judicial review as a remedy for the failure to provide a pre-deprivation hearing, but as just discussed a post-judicial review, post-remand Council

hearing on the downzoning after ACP had lost $8 million and been forced to abandon its lease was meaningless to ACP and constitutionally inadequate. This Court established long ago that a violation of due process is not cured by an opportunity for judicial review or an appeal. See *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (State's trial court procedure is not "deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance").

There is no evidence that a post-remand Council hearing would have been fair or impartial. The record is to the contrary: When Judge Conway ordered the City to evaluate ACP's site plan under the 1981 USP, the City did not comply with the order. Resp. App. 8a.

### D. The Decisions The City Relies On Are Distinguishable Or No Longer Good Law

The City again cites *River Park* as a supposedly conflicting decision. Pet. 20. But as discussed above, in *River Park* and *LC&S* there was no constitutionally protected interest in continued zoning, so the statement "scant process is all that is 'due' in zoning cases" is not surprising. *LC&S*, 244 F.3d at 605. To the extent *River Park* reiterated *Williamson County* that Federal court ripeness cannot be avoided by framing claims in terms of due process, 23 F.3d at 167, the City abandoned both its ripeness argument and any challenge to the ruling below that ACP's takings and due process claims were not co-extensive, an issue not addressed in *River Park* or *LC&S*.

And once again, the City's string citations hide multiple defects with its claim of conflict. In *Cormack v. Settle-Beshears*, 474 F.3d 528, 531-32 (8th Cir. 2007), a due process claim failed because the owner had not shown that state law lacked a mechanism to provide "*just compensation* for the alleged *taking*." In *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019-20 (8th Cir. 2000), the Eighth Circuit stated solely in *dicta*, in a decision concerning only attorney's fees, that a due process claim should have been dismissed on ripeness grounds. In neither case did plaintiffs invoke state law remedies, as ACP did here. In addition, both cases concern Federal ripeness—an immaterial issue the City failed to preserve here. As if these distinctions were not enough, the Eighth Circuit recently limited these decisions – and resolved any intra-circuit conflict that troubles *amici* – by ruling that "it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process." *Keating v. Neb. Public Power Dist.*, 562 F.3d 923, 929 (8th Cir. 2009) (emphasis in original). Of course, that is *precisely* the situation here.

*Landmark Land Co. of Okla. v. Buchanan* dismissed a procedural due process claim not on ripeness grounds but because plaintiff failed to state a claim. 874 F.2d 723. Finally, *McKinney v. Pate*, 20 F.3d 1550, 1553 (11th Cir. 1994)(en banc), overruled prior precedent concerning substantive due process claims by government employees. The discussion of procedural due process claims quoted by the City is *dicta*, as recognized by the concurring judges. *Id.* at 1567. *Amici*'s *McKinney* quote concerns not ripeness but "completeness" of a property

deprivation under *Zinermon*, an issue abandoned by the City in this Court.[5]

In summary, certiorari is not appropriate because the City has neither identified a specific holding below for review nor raised any material Federal issue that was properly preserved or decided below, and the premise of the City's argument is false.

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5. Although the Court of Appeals correctly affirmed the due process verdicts, the court erroneously ruled that New Mexico law provides an adequate post-deprivation remedy. Pet. App. 21a-22a. Under *Parratt* and *Zinermon*, the fact that New Mexico law provided ACP no recourse to recover $8 million in losses resulting from the downzoning of ACP's property—which was not random or unauthorized—means that a meaningful pre-deprivation hearing and impartial tribunal were required. Further, neither City nor New Mexico law afforded any opportunity for an impartial and meaningful post-deprivation *hearing* as a matter of right. Correction of this error would provide an alternative ground for affirmance, making this case an unsuitable vehicle to address the second Question Presented.

## CONCLUSION

The Court of Appeals' decision—following fourteen years of litigation—rests on New Mexico's unusual land use law and unique facts that are unlikely to recur. There are no broad Federal rulings or conflicts with decisions of this Court or other appellate courts. The City did not preserve its issues, and fails to meet any criteria for review.

The Writ of Certiorari should be denied.

Respectfully submitted,

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January 8, 2010

# APPENDIX

## APPENDIX G — ORDER OF THE SUPREME COURT OF THE STATE OF NEW MEXICO DATED JULY 15, 2009

## IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

July 15, 2009

NO. 31,724

ALBUQUERQUE COMMONS PARTNERSHIP,

Petitioner-Petitioner,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,

Respondent-Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari to the New Mexico Court of Appeals filed pursuant to Rule 12-502 NMRA, and the Court having considered said petition and being sufficiently advised issued its writ of certiorari on July 1, 2009; and

WHEREAS, the petition was GRANTED on all issues as stated in the petition.

NOW, THEREFORE, IT IS ORDERED that this cause hereby is placed on the GENERAL CALENDAR and the parties hereby are notified that the record proper, transcript of proceedings, and exhibits were filed in this Court on July 8, 2009;

*Appendix G*

IT IS FURTHER ORDERED that the brief in chief shall be timely if filed on or before August 31, 2009;

IT IS FURTHER ORDERED that the briefs shall consolidate and update any briefs filed in the New Mexico Court of Appeals *with respect to the issues identified herein*, without incorporation by reference, and shall comment on the Court of Appeals opinion issued on May 7, 2009; and

IT IS FURTHER ORDERED that oral argument may be requested pursuant to Rule 12-214(B) NMRA.

IT IS SO ORDERED.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 15th day of July, 2009.

(SEAL)

s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

## APPENDIX H — ORDER OF THE SECOND JUDICIAL DISTRICT COURT, COUNTY OF BERNALILLO, STATE OF MEXICO DATED JULY 23, 1999

**SECOND JUDICIAL DISTRICT COURT**
**COUNTY OF BERNALILLO**
**STATE OF NEW MEXICO**

No. CV 95-06031

ALBUQUERQUE COMMONS PARTNERSHIP,

Plaintiff,

vs.

CITY COUNCIL, o/b/o CITY OF ALBUQUERQUE,

Defendant.

### ORDER

THIS MATTER comes before the Court pursuant to the Court's whole record review of Petitioner's appeal from the enactment by the City of Albuquerque of the 1995 Revised Uptown Sector Development Plan, and the petition for review of the City's refusal to hear Petitioner's site development plan 2-94-133 (Counts I and II of the Second Amended Petition). This matter also comes before the Court for a reconsideration of the Respondent's June 6, 1977 Motion for Summary Judgment, which the Court previously granted in part by letter decision. The Court has reviewed the record and the applicable law and has heard and considered the arguments of counsel, and FINDS AND CONCLUDES that:

1. The Revised Uptown Sector Development Plan's creation of an intense urban core constitutes a downzoning of Petitioner's property interest in the land it leases from the Archdiocese of New Mexico.

*Appendix H*

2. The City of Albuquerque treated the 1995 amendment of the Uptown Sector Development Plan as an amendment of the text of a Sector Plan, not as a zone change. The City, therefore, did not address the requirements of R270 1980, for a zone change when it amended the sector plan.

3. There is not substantial evidence in the record as a whole to establish that the zone change requirements of R270 1980 were met, that there was an error in the 1991 Uptown Sector Development Plan, that changes in the neighborhood since 1981 justified the 1995 intense urban core revisions of the 1981 Plan or that the 1995 revisions were more advantageous to the community.

4. Throughout the sector plan amendment process, the Respondent treated the amendment as a legislative action and not a zone change of a small area requiring quasi-judicial procedures to be followed.

5. The Respondent's downzoning of Petitioner's property is a quasi-judicial act. Petitioner was entitled to, and did not receive, quasi-judicial review of its objections to the downzoning by an impartial decision maker.

6. The Respondent's failure to give reasons for its changes to the 1981 Uptown Sector Plan violated its own procedures and deprived Petitioner of procedural due process.

7. The Court's letter decision of October 30, 1997 granting summary judgment on Count II and other claims in the First Amended Petition was erroneous.

*Appendix H*

Petitioner's claims for review of the Respondent's denial of its site development application, Z-94-133, via its indefinite deferral by the Environmental Planning Commission, were ripe. Petitioner did exhaust its administrative remedies because any attempt to appeal the indefinite deferral administratively would have been futile.

8. On Count II, Petitioner is entitled to review by Respondent of its Z-94-133 site development plan according to the provisions of the 1981 Uptown Sector Development Plan.

9. Count III of the Second Amended Petition is ripe for decision by this Court. Summary judgment on Count III should be granted to Respondent on the claim in Count III alleging denial of substantive due process. The Respondent's decision to adopt the 1995 Revised Sector Development Plan bore a reasonable relationship to its exercise of its zoning power, and was not arbitrary or capricious. *Norton vs. Village of Corrales*, 103 F.2d 928 (10th Cir. 1996).

10. Count IV of the Second Amended Petition is ripe. Respondent's motion for summary judgment should be granted, because the Respondent's actions do not constitute a taking of all or substantially all Petitioner's beneficial uses of its interest in the subject property. *Landgate vs. California Coastal Commission*, 953 P. 2d 1188 (Cal. 1998).

11. Count V of the Second Amended Petition is moot.

*Appendix H*

12. Count VI is moot with respect to a permanent taking and ripe with respect to a temporary taking. Summary judgment should be granted to Respondent on the temporary taking claim. *Id.*

13. Count VII is moot, based on the Court's decision on Count II.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Respondent is prohibited from applying the intense urban core provisions of the 1995 Revised Uptown Sector Development Plan applications by Petitioner to develop the subject property.

2. Upon request by Petitioner, Respondent shall refer Z-94-133 the Environmental Protection Agency for consideration under the provisions of the 1981 Uptown Sector Development Plan. Respondent, its staff and committees and commissions shall apply the provisions of the 1981 Sector Development Plan to all administrative reviews of Z-94-133.

3. The claim of violation of Petitioner's substantive due process rights contained in Count III of the Second Amended Petition is dismissed with prejudice. Respondent's motion for summary judgment on the claim of violation of procedural due process is denied.

4. Counts IV, V, VI and VII of the Second Amended Petition are dismissed with prejudice.

5. The Court will hold a hearing on Count III, procedural due process violation, to determine if damages should be awarded resulting from the delay

caused by Respondent's denial of Petitioner's due process rights.

s/ SUSAN M. CONWAY
SUSAN M. CONWAY
District Judge

Endorsed copy mailed or delivered
by the Court on date of filing
to counsel of record:

David Suffling, Esq.
George R. Bryan, III, Esq.

## APPENDIX I — ORDER OF THE SECOND JUDICIAL DISTRICT COURT, STATE OF NEW MEXICO, COUNTY OF BERNALILLO DATED JUNE 19, 2001

**SECOND JUDICIAL DISTRICT COURT**
**STATE OF NEW MEXICO**
**COUNTY OF BERNALILLO**

NO. CV 2000-03870

ALBUQUERQUE COMMONS PARTNERSHIP,

Petitioner,

vs.

CITY COUNCIL OF THE
CITY OF ALBUQUERQUE,

Respondent.

**ORDER**

This matter came before the Court for whole record review pursuant to SCRA 1-074 and NMSA 3-19-8 and 3-21-9 and the Court having reviewed the record and heard arguments and presentations of counsel makes the following findings:

1. The Albuquerque City Council in rejecting Petitioner's appeal from the adverse decision of the Environmental Planning Commission, failed to abide by Judge Susan Conway's orders in CV 95-6031 which required the Respondent to proceed on Petitioner's application under the 1981 Uptown Sector Plan.

2. The Respondent did not consider the Petitioner's proposed site plan in accordance with the 1981 Plan.

*Appendix 1*

3. The submission met all of the 1981 Sector Plan criteria, as admitted and announced by at least two members of the Respondent Council in rejecting Petitioner's appeal.

Therefore the Court reverses the City's denial of the site plan and orders that the plan Z 94-133 be approved by Respondent City.

s/ William F. Lang
HONORABLE WILLIAM F. LANG
DISTRICT JUDGE

Approved as to form:

s/ Timothy V. Flynn-O'Brien
Timothy V. Flynn-O'Brien
Attorney for Petitioner

s/ David Suffling
David Suffling
Attorney for Respondents

s/ John P. Salazar
John P. Salazar
Attorney for Uptown Neighborhood Assn.

s/ Paul M. Kienzle, III
Paul M. Kienzle, III
Attorney for Interested Parties

## APPENDIX J — PETITIONER-APPELLANT CITY COUNCIL OF THE CITY OF ALBUQUERQUE'S PETITION FOR WRIT OF CERTIORARI FILED MAY 27, 2009

### IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Supreme Court No. 31,725
Court of Appeals No. 24,026,
consolidated with
Nos. 24,027, 24,042, 24,425.

ALBUQUERQUE COMMONS PARTNERSHIP,

Petitioner-Respondent,

v.

CITY COUNCIL OF THE
CITY OF ALBUQUERQUE,

Respondent-Petitioner.

### PETITIONER-APPELLANT CITY COUNCIL OF THE CITY OF ALBUQUERQUE'S PETITION FOR WRIT OF CERTIORARI

**A. Decision Below**

In the wake of the City's motion for rehearing, The Court of Appeals, on May 7, 2009, withdrew a prior opinion and issued the instant Opinion, rejecting the City's administrative appeals and affirming the decision of the district court in favor of Albuquerque Commons Partnership (ACP) on its 42 U.S.C. §1983 claim. (Copy Attached as required by Rule 12-502(C)(3) NMRA (2009))

*Appendix J*

**B. Questions Presented**

Whether the Court of Appeals erred in:

1. Concluding that ACP had a federally protected property right *in 1995*, based upon a "substantial narrowing" of the City's discretion *in a later decided 2008 appellate opinion*, and rejecting federal law that a federally protected entitlement exists only where the state actor's discretion is so limited that a person has a right to a particular outcome?

2. Equating an administrative level procedural deprivation with a due process violation, when the state-provided an appeal process capable of remediating the initial deprivation?

3. Departing from New Mexico's approach of examining the whole proceeding, including the appeals afforded, and aligning with an erroneous construction of *Zinermon v. Burch*, 494 U.S. 113 (1990) adopted by a minority of federal courts respecting when a due process violation is "complete" for purposes of a 42 USC § 1983 claim?

4. Equating *ex parte* contact normal to legislative proceedings with a disqualifying bias when the *ex parte* contact complained of caused no disqualifying bias or harm to ACP?

**C. Facts Material to Questions Presented**

The Court of Appeals initially upheld the City's adoption of the 1995 USP as a valid "legislative" action and vacated ACP's money judgment premised on the district court's ruling prohibiting the application of the

1995 USP to ACP. *See Albuquerque Partnership v. City Council of the City of Albuquerque (ACP II)*, 2006-NMCA-143, 140 N.M. 751, 149 P.3d 67. This Court, in *Albuquerque Commons Partnership v. City Council of the City of Albuquerque (ACP III)*, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411, reversed, holding that ACP's property was downzoned by the adoption of the 1995 USP, and that state law obligated the City to provide ACP with a quasi-judicial, rather than a legislative process.

The City's decision to proceed legislatively was based on a good faith opinion from the City Attorney, who reasonably relied on *Mandel v. City of Santa Fe*, 119 N.M. 685, 894 P.2d 1041 (Ct. App. 1995), as did the Court of Appeals, in deciding the complex question and concluding that its proposed action would not constitute a downzoning, thereby permitting a legislative hearing.

During the ensuing legislative proceedings, City Council members received the normal and expected input from constituents, including ACP. The record established that Councilor Perea, aware of ACP's concerns, as well as the conflicting concerns of other area residents and businesses, attempted to craft a compromise that would allow ACP to develop its property while not destroying or impairing the City's ability to meet its goals for Uptown. *See June 19, 2005 transcript, page 19*, wherein ACP's counsel states "I'd like to applaud Councilor Perea's attempt to forge a compromise with which everyone could live." Although Councilor Perea drafted proposed amendments to the 1995 USP, those amendments were not formally

introduced before the City Council because both ACP and community groups already had rejected them.

This Court, in *ACP III*, instructed the Court of Appeals to consider the City's remaining claims of error—requiring that Court to determine whether there was a federally protected property interest giving rise to a § 1983 cause of action, and whether the availability of additional state processes precluded a § 1983 claim for damages. The Court of Appeals concluded that:

1) ACP had a federally protected property interest in continued zoning, *id* at ¶18;

2) ACP's Section 1983 action was not foreclosed by available state remedies, *id*, at ¶ 43; and

3) the City's failure to provide ACP with an impartial tribunal violated ACP's right to procedural due process. *Id.*

**D. Basis for Granting the Writ**

Based on this Court's conclusion in *ACP III* that the City made a mistake when it concluded that the 1995 USP did not effect a downzoning, the Court of Appeals reasoned that because one particular *ex parte* contact, albeit appropriate in legislative proceedings, actually influenced a council member's actions, there was actual bias that meant the proceeding was unfair. It then concluded that a hearing, which was unfair due to bias, could not be corrected by the appellate process. Therefore, there was a federal due process violation that could not be cured.

The practical result of this flawed analysis is that any time a governmental entity dealing with zoning and land use regulation makes a good faith error of law in selecting a legislative procedure, the error will be irremediable because a legislative proceeding (which always includes *ex parte* contacts with constituents), will necessarily be "biased." As explained below, the Court gets to this illogical result by erroneously (1) finding a property right based on procedural proof requirements imposed *after the fact* and transformed into substantive limitations, (2) equating the City's failure to articulate the after-the-fact criteria as the basis for its decision with a lack of proof of those criteria, (3) equating an initial good faith error respecting governing law, and the appropriate kind of hearings required, with a complete absence of any pre-deprivation hearing, and (4) equating *ex parte* contact, normal to a legislative process, with the disqualifying bias prohibited in a judicial proceeding.

Having judged a legislative process by standards governing a quasi-judicial proceeding and, unsurprisingly, finding that it did not measure up, the Court has stripped the State of its ability to cure administrative level mistakes. This, as a practical matter, eliminates the review of proceedings *as a whole* before deciding if there has been any due process violation under the Fourteenth Amendment to the United States Constitution.

*Appendix J*

The Court of Appeals' Opinion is in conflict with:

*Smith v. Bernalillo County,* 2005-NMCA-012, ¶ 35, 137 N.M. 280, (Zoning authorities could rely on the broader purpose underlying the zoning statute).

*Archuleta v. Santa Fe Police Dept. ex rel. City of Santa Fe,* 2005-NMSC-006, ¶ 17, 137 N.M. 161 and *Siesta Hills Neighborhood Ass'n v. City of Albuquerque,* 1998-NMCA-028, ¶ 11,124 N.M. 670 (Administrative decisions will not be overturned simply because not of ideal clarity).

*Starko v. Gallegos,* 2006-NMCA-085, ¶ 19, 140 N.M. 136 (No due process claim when state remedies were available to address the error).

*In re U.S. West Communications,* 1999-NMSC-016, ¶ 26, 127 N.M. 254 (New Mexico considers the proceedings as a whole; disqualifying bias requires prejudgment or deep seated antagonism that would make a fair judgment impossible).

*Daddow v. Carlsbad Mun. School Dist.,* 120 N.M. 97, 114-15, 898 P.2d 1235, 1252-53 (1995) (Minzner, J. concurring and dissenting) (A correctable violation of state law is not tantamount to a violation of a federal right.)

**E. Argument and Authorities**

**Issue 1: Retrospective application of narrowed discretion under Resolution 270-1980**

The Court of Appeals held that *ACP III* had "substantially narrowed the City's discretion" in applying R270-1980's third factor, Opinion, ¶16, by

engrafting an Oregon ruling, *Fasano v. Bd. of County Comm'rs of Wash. County,* 507 P.2d 23, 28 (Or. 1973), that an applicant for a zoning change *had to show* (1) a public need for the change of the kind in question and (2) that the need would be best served by changing the classification of the particular piece of property in question as compared to other available property.[1] The Court of Appeals then retroactively applied the 2008 criteria to the City's decision thirteen years earlier to conclude that ACP had a federally protected property right in 1995.

By correctly concluding that this Court had "substantially narrowed" the City's discretion when it adopted the Oregon rule, the Court of Appeals necessarily conceded that the City had broader discretion in 1995 than it has in proceedings conducted after *ACP III.* That conclusion cannot be faulted. The zoning enabling statutes, NMSA 1978 § 3-19-1 *et seq.* and § 3-21-1 to 14, give the City discretion to make zoning decisions within the context of its master plan, so long as those decisions are not arbitrary, capricious, unlawful or unsupported by substantial evidence, and R270-1980 parallels the statutory language and incorporates the master plan's guidelines.

Additionally, the Court of Appeals confused the City's failure to articulate the reasons for the adoption of the 1995 USP, using *Fasano's* language or the language of R270-1980, with a failure to establish the

---

1. Prior to *ACP III* case law required only that such matters need be "taken into account." *Miller v. City of Albuquerque,* 89 N.M. 503, 506, 554 P.2d 665, 668 (1976).

relevant factors. Undisputed facts demonstrate that (1) ACP's property was the last large piece of undeveloped property in the Uptown and (2) was located in the center of Uptown. Thus, the City had sufficient proof that there was a need to change the Uptown Sector Plan so that the remaining development would not defeat the Comprehensive Plan's goal of creating an urban center and that the change had to affect ACP's property in order to fulfill its purpose.

Because the administrative record justifies the City's decision under R270-1980 and the language of *Fasano*, there was no due process violation. To find a due process violation, where the evidence to justify its decision was before the decision maker, because it did not articulate the basis for its decision in the language adopted after-the-fact, or the language of the regulation, exalts form over substance. *Davis v. Los Alamos Nat. Laboratory*, 108 N.M. 587, 591, 775 P.2d 1304, 1308 (Ct. App. 1989) (Hearing officer ruling affirmed if right for any reason and not unfair to parties.)

Finally, in applying new criteria retrospectively, the Court also departed from the rule that a party has a federally protected property interest only when it has an entitlement, and that there is no entitlement unless the government's discretion is so circumscribed that the party has a right to a particular outcome. *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *Jacobs v. Meister*, 108 N.M. 488, 494, 775 P.2d 254, 260 (Ct. App. 1989).

*Appendix J*

**Issue 2: Misapplication of the cases dealing with a complete failure to provide a pre-deprivation hearing**

In paragraph 36 of its Opinion the Court noted that, in some cases, due process requires a pre-deprivation hearing and, in those cases, existence of an appellate procedure will not cure the due process violation that results from the failure to provide any pre-deprivation hearing. The Court of Appeals erroneously equated a mistaken form of hearing with a complete failure to provide any hearing. It then compounded its error by assuming that only a random and unauthorized failure to provide a hearing could be "cured" by post-deprivation remedies. It, therefore, immediately moved to the question whether the City's action in adopting the 1995 USP was "random and unauthorized."

The leap to the *Zinermon* "random and unauthorized" discussion was error because *Zinermon* addressed only situations where there was a complete absence of a pre-deprivation hearing. A deficient hearing is not the same as no hearing at all, even under the very restrictive view of "random and unauthorized" adopted by a minority of the federal circuits.

Rather, where the pre-deprivation administrative hearing is procedurally defective, and even unfair, but the defect can be corrected through the appeals process, then the proceedings as a whole are to be considered. If the procedural deficiency is correctable through the process as a whole, then the state has not failed to provide due process and there is no violation of the Fourteenth Amendment. *See e.g. Chmielinski v.*

*Massachusetts*, 513 F.3d 309, 317-18 (1st Cir. 2008) (No due process violation due to a biased hearing officer where plaintiff was not deprived of the opportunity to put his version of the facts before the decision maker.); *Sunrise Corp. of Myrtle Beach, LLC v. City of Myrtle Beach*, 420 F.3d 322, 326-28 (4th Cir. 2005) (Even if administrative hearing was unfair, plaintiffs received sufficient levels of review to assure procedural due process); *Crocker v. Hakes*, 616 F.2d 237, 239-40 (5th Cir. 1980) (City Council held a hearing when it should have created a zoning board of appeals; the court required the creation of the zoning board; the City Council later refused to enforce the decision of that zoning board, but the petitioner could seek further review in the state courts: Held constitutional rights were not abridged; mere mistakes of law do not rise to the level of constitutional violations.); *accord Norton v. Village of Corrales*, 103 F.3d 928, 930-31 (10th Cir. 1996) (Error in the administration of state law "is not a matter of federal judicial cognizance under the due process clause. . . ;" even where an ordinance is invalid, where there were opportunities to appear and present arguments, plaintiffs' due process claims are appropriately dismissed.).

In *Horton v. Bd. of County Comm'rs*, 202 F.3d at 1300, the Court clarified its holding in *McKinney v. Pate*, 20 F.3d at 1561-65, explaining:

> *McKinney* is based on a recognition that the process a state provides is not only that employed by a . . . governmental entity whose action is in question, but also includes the

> remedial process state courts would provide if asked * * * the *McKinney* rule looks to the existence of an opportunity * * *If the state courts would [provide an adequate remedy], then there is no federal procedural due process violation regardless of whether the plaintiff has taken advantage of the state remedy or attempted to do so.

The correct question is not whether a mistake by a state actor is "random and unauthorized" (although surely most mistakes would qualify as such) but whether the state's remedial law is adequate to correct the procedural deficiency. ACP does not and cannot assert that New Mexico's appeal process for administrative matters is defective, or that our courts lack the ability to perceive and correct errors in administrative proceedings. ACP was entirely able to vindicate its position through the district and appellate courts and obtain the process that was due. Thus, despite the procedural deficiency—holding a legislative hearing at the administrative level—a due process violation was not "complete" because the State did not fail to provide the process due. *See, Horton*, 202 F.3d at 1301-02.

Rewarding a party for bypassing a demonstrably adequate appeals process, which includes a right to remand that is capable of remedying a deficiency, because the decision to hold a legislative hearing is deemed not "random or unauthorized," is contrary to applicable Fourteenth Amendment jurisprudence. The Court of Appeals Opinion impermissibly allows errors, correctable under state law, to form the basis of a

constitutional violation. This result obtains even where, as here, the City was acting in good faith and reasonably relying on what appeared to be governing law.

In related contexts, such as situations involving law enforcement, state actors have qualified immunity if the law is unclear. Where judicial officers make errors of law they are immune. Municipal governments relying on good faith advice of counsel about ambiguous law deserve no less protection from precipitous Section 1983 lawsuits based on correctable errors. *See Crocker v. Hakes*, 616 F.2d at 239-40.

**Issue 3: Proper application of the *Zinermon* doctrine**

Federal jurisprudence in land use cases requires that all state remedies be pursued before resort to the United States Constitution. *Zinermon*, 494 U.S. at 126; *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172, 195 (1985). It is settled that proceedings must be viewed as a whole to determine whether an initial procedural deficiency became "complete," and that a deficiency does not become a due process violation unless the post-deprivation remedies for that deficiency are incapable of correcting the procedural error. *Zinermon*, 494 U.S. at 126.

A majority of the federal circuit courts hold that only where state law and procedure itself authorizes the refusal to grant a required pre-deprivation hearing is a post-deprivation remedy deemed inadequate as a matter of law. This is the view adhered to in the Tenth Circuit

and in *U.S. West Communications*, 1999-NMSC-016, ¶ 26. The Court of Appeals departed from this view, adopting instead the minority view by which consideration of post-deprivation procedures is eliminated except where a failure to provide a pre-deprivation hearing results from a (narrowly defined) "random and unauthorized" act. In so doing, the Court of Appeals has confused the question whether an alleged due process violation is *complete* with the question whether a due process violation can be cured. *See* Opinion, ¶ 35.

**Issue 4: Equating all *ex parte* contact with disqualifying bias**

Equating the wrong form of hearing with no hearing at all, which underlies the mistaken reliance on the minority view *of Zinermon*, appears to be based on the mistaken notion that Councilor Perea's decision not to introduce amendments, which ACP had already rejected, meant there was actual bias and the absence of an impartial tribunal. *See* Opinion, ¶¶ 32, 42. The administrative record, including ACP's statements, belies the assumption.

New Mexico law defines a disqualifying bias as a prejudgment or a deep seated antagonism that would make a fair judgment impossible. It does not equate mere *ex parte* contacts with a disqualifying bias. *In re U.S. West Communications*, 199-NMSC-016, ¶¶ 40-44; *Siesta Hills Neighborhood Ass'n.*, 1998-NMCA-028, ¶¶ 17-19 (There was no basis for a claim of bias where there was no evidence of prejudgment.); *accord, Las Cruces Professional Fire Fighters v. City*

*of Las Cruces*, 1997-NMCA-031, ¶¶ 22-24, 26, 28, 31, 123 N.M. 239 (Attempting compromise does not indicate a disqualifying bias.)

When a hearing is held before an officer with a disqualifying bias and the complaining party is not afforded an opportunity to place its position of record, so that subsequent review would be meaningful, it might equate to a complete failure to hold a hearing. Affording six legislative hearings based on a reasonable, albeit mistaken view of the law, wherein one of the decision makers unsuccessfully attempts to find a compromise, is simply not comparable to a complete failure to hold any hearing. The Court erred in assuming that it was.

**F. Conclusion**

For the foregoing reasons, this Court should grant Certiorari and allow for plenary review of the merits of the City's claim that the Court of Appeals erred in reinstating the district court judgment entered in favor of ACP.

Respectfully submitted,
CITY OF ALBUQUERQUE
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City Attorney

s/ Mark Hirsch
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## APPENDIX K — RELEVANT STATUTE

### ENACTMENT 270-1980

ADOPTING POLICIES FOR ZONE MAP CHANGE APPLICATIONS AND APPEALS OF ENVIRONMENTAL PLANNING COMMISSION DECISIONS; SUPERSEDING CITY COUNCIL RESOLUTIONS 217-1975 AND 182-1978 RELATING TO ZONE CHANGE APPLICATIONS AND APPEALS.

**WHEREAS**, the usefulness of the Comprehensive City Zoning Code in implementing the City's Comprehensive Plan and promoting health, safety, morals, and general welfare is enhanced by a reasonable flexibility in order to deal reasonably with changes in the physical, economic, and sociological aspects of the city; and

**WHEREAS**, certain general policies for consideration of zone map changes and other zoning regulation changes should be recognized as determinative.

BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

Section 1. The following policies for deciding zone map change applications pursuant to the Comprehensive City Zoning Code are hereby adopted:

A. A proposed zone change must be found to be consistent with the health, safety, morals, and general welfare of the City.

B. Stability of land use and zoning is desirable; therefore, the applicant must provide a sound

justification for the change. The burden is on the applicant to show why the change should be made, not on the City to show why the change should not be made.

C. A proposed change shall not be in significant conflict with adopted elements of the Comprehensive Plan or other City master plans and amendments thereto including privately developed area plans which have been adopted by the City.

D. The applicant must demonstrate that the existing zoning is inappropriate because;

(1) there was an error when existing zone map pattern was created, or

(2) changed neighborhood or community conditions justify the change, or

(3) a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan, even though (1) or (2) above do not apply.

E. A change of zone shall not be approved where some of the permissive uses in the zone would be harmful to adjacent property, the neighborhood or the community.

F. A proposed zone change which, to be utilized through land development, requires major and unprogrammed capital expenditures by the City may be;

(1) denied due to lack of capital funds, or

(2) granted with the implicit understanding that the City is not bound to provide the capital improvements on any special schedule.

G. The cost of land or other economic consideration pertaining to the applicant shall not be the determining factor for a change of zone.

H. Location on a collector or major street is not in itself sufficient justification of apartment, office, or commercial zoning.

I. A zone change request which would give a zone different from surrounding zoning to one small area, especially when only one premise is involved, is generally called a "spot zone." Such a change of zone may be approved only when;

(1) the change will clearly facilitate realization of the Comprehensive Plan and any applicable adopted sector development plan or area development plan, or

(2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones; because the site is not suitable for the uses allowed in any adjacent zone due to topography, traffic, or special adverse land uses nearby; or because the nature of structures already on the premises make the site unsuitable for the uses allowed in any adjacent zone.

J. A zone change request which would give a zone different from surrounding zoning to a strip of land along a street is generally called "strip zoning." Strip commercial zoning will be approved only where;

(1) the change will clearly facilitate realization of the Comprehensive Plan and any adopted sector development plan or area development plan, and

(2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones or because the site is not suitable for the uses allowed in any adjacent zone due to traffic or special adverse land uses nearby.

Section 2. City Council Resolutions 217-1975 and 182-1978 adopting policies for zone map change applications and appeals of (the) Environmental Planning Commission are hereby superseded.

Supreme Court U.S.
JAN 19 2010
OFFICE OF THE CLERK

No. 09-564

IN THE
# Supreme Court of the United States

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
*Petitioner,*

v.

ALBUQUERQUE COMMONS PARTNERSHIP,
*Respondent.*

**On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico**

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI | 1 |
| I. THE QUESTIONS ARE PROPERLY PRESENTED FOR THIS COURT'S REVIEW | 1 |
| II. THIS COURT SHOULD RESOLVE THE DEEPENING SPLIT AS TO WHETHER ORDINARY LEGISLATIVE PROCESS SATISFIES FEDERAL DUE PROCESS REQUIREMENTS IN ZONING DECISIONS | 4 |
| III. THIS COURT SHOULD RESOLVE THE SPLIT AS TO WHETHER A PROPERTY OWNER IS ENTITLED TO § 1983 DAMAGES WITHOUT FIRST PURSUING STATE LAW REMEDIES FOR A DUE PROCESS VIOLATION IN ZONING CASES | 9 |
| CONCLUSION | 12 |

TABLE OF AUTHORITIES

CASES Page

*American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40 (1999) ..... 5
*Arnel Dev. Co.* v. *City of Cosa Mesa*, 620 P.2d 565 (Cal. 1980) ..... 7
*Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564 (1972) ..... 4
*City of Eastlake* v. *Forest City Enters., Inc.*, 426 U.S. 668 (1976) ..... 6
*Club Misty, Inc.* v. *Laski*, 208 F.3d 615 (7th Cir. 2000) ..... 5
*Cormack* v. *Settle-Beshears*, 474 F.3d 528 (8th Cir. 2007) ..... 10
*Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469 (1975) ..... 1
*Eacret* v. *Bonner County*, 86 P.3d 494 (Idaho 2004) ..... 7
*Emmett McLouglin Realty, Inc.* v. *Pima County*, 132 P.3d 290 (Ariz. Ct. App. 2006) ..... 7
*Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) ..... 2
*Hume* v. *Franklin County Fiscal Court*, 276 S.W.3d 748 (Ky. 2008) ..... 7
*Jackson Court Condominiums, Inc.* v. *City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989) ..... 6
*McPherson Landfill, Inc.* v. *Board of County Comm'rs*, 49 P.3d 522 (Kan. 2002) ..... 7
*Mercer* v. *Theriot*, 377 U.S. 152 (1964) ..... 2
*Morrissey* v. *Brewer*, 408 U.S. 471 (1972) ..... 5
*O'Neill* v. *Town of Nantucket*, 711 F.2d 469 (1st Cir. 1983) ..... 6

TABLE OF AUTHORITIES—continued


| | Page |
|---|---|
| *River Park, Inc.* v. *City of Highland Park*, 23 F.3d 164 (7th Cir. 1994) | 5, 10 |
| *Urie* v. *Thompson*, 337 U.S. 163 (1949) | 2 |
| *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) | 9, 10 |
| *Zinermon* v. *Burch*, 494 U.S. 113 (1990) | 9 |

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ACP's opposition cannot diminish the importance of the two questions presented in this case, both of which have divided federal and State courts. Neither question turns on State law or factual issues, as ACP suggests. To the contrary, whether federal due process requirements prohibit a local government from imposing a zoning change by ordinary legislative process, and whether a property owner may challenge such a zoning change and seek money damages under § 1983 without first pursuing state law remedies, are strictly federal questions that are properly presented in this case.

### I. THE QUESTIONS ARE PROPERLY PRESENTED FOR THIS COURT'S REVIEW.

Contrary to respondent's specious arguments regarding jurisdiction and waiver, *see* BIO 12-13, 17-18, 26-27, the Court plainly can review both questions presented. ACP first suggests that ongoing proceedings in the State Supreme Court regarding post-judgment interest somehow affect this Court's review. BIO 12. Those proceedings, however, involve only a peripheral issue that is unrelated to either question presented. Where, as here, the relevant questions of federal law have been fully and finally determined in State court, and "[n]othing that would happen in the course" of the ongoing proceedings "would foreclose or make unnecessary decision on the federal question," this Court retains jurisdiction. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975).

ACP next asserts that the City "failed to preserve" the questions presented, BIO 13, 17-18. This is incorrect. As to the first question presented—

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whether the City's use of legislative process in its zoning decision satisfied due process—the State Supreme Court already held in 2008 that "the City's decision" to provide ordinary legislative process "lacked procedural fairness and did not comport with due process of law." App. 76a (¶ 52); *see also* App. 64a, 71a-72a (¶¶ 33, 43). The City was thus not required, in order to preserve the question, to seek a *second* review of it in the State Supreme Court in 2009. *See Urie* v. *Thompson*, 337 U.S. 163, 171 (1949); *see also Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916).

Nonetheless, ACP argues that the City somehow "waived" the issue by arguing in the Court of Appeals on remand that the State Supreme Court's decision should be construed as not requiring a quasi-judicial process. BIO 17-18. The court of appeals determined that the State Supreme Court had held that "ACP's right to due process had been violated." App. 3a (¶ 4). And, the court of appeals went on to hold that based on the City Council's "*ex parte*" contacts with the public, "the City Council was a biased tribunal" that could not provide ACP with adequate process. App. 19a-20a (¶¶ 31-32). Following that ruling, the City *again* sought State Supreme Court review on the due process issue. The City asked the State Supreme Court to determine whether the court of appeals had erred in "[e]quating *ex parte* contact normal to legislative proceedings with a disqualifying bias," Resp. App. 11a, and asserted that such normal legislative process "is simply not comparable to a complete failure to hold any hearing," as the court of appeals' opinion indicated, Resp. App. 23a. In short, the City sought State court review of its due process obligations at every possible opportunity.

As to the second question presented—whether ACP was entitled to damages under § 1983 without first pursuing available state remedies—ACP initially asserts that the issue is not properly before the Court. According to ACP, the court of appeals never held that ACP need not pursue state law remedies before obtaining § 1983 damages, and the City never sought any such decision. BIO 26-27. Both assertions are false.

First, the court of appeals squarely held "that ACP's Section 1983 action was not foreclosed by available state remedies." App. 27a-28a (¶ 43). *See also* App. 30a (¶ 46). What ACP ridicules as a "fantasy" holding, BIO 26, is in fact reality. Second, as the court of appeals recognized, the City argued that issue to the court. "[T]he City's second argument" to the court was that a property owner could not properly be permitted "'the unilateral option to cash in on any procedural flaw in an administrative proceeding by declining remand and pursuing a [Section] 1983 action.'" App. 26a (¶ 41) (alteration in original).

Moreover, when the court of appeals ruled against the City, the City sought further review in the State Supreme Court. The City asked for review of whether the Court of Appeals had erred in "[e]quating an administrative level procedural deprivation with a due process violation, when the state provided an appeal process capable of remediating the initial deprivation." Resp. App. 11a. The City argued that "[f]ederal jurisprudence in land use cases requires that all state remedies be pursued before resort to the United States Constitution," Resp. App. 21a; *see also* Resp. App. 20a ("right to a remand"), the same argument it is advancing here. *See, e.g.*, Pet. 21 ("plaintiffs challenging zoning decisions under the

Due Process Clause ... must pursue state law remedies"). The question was thus preserved.

## II. THIS COURT SHOULD RESOLVE THE DEEPENING SPLIT AS TO WHETHER ORDINARY LEGISLATIVE PROCESS SATISFIES FEDERAL DUE PROCESS REQUIREMENTS IN ZONING DECISIONS.

The court below held that ordinary legislative process, which normally involves "contacts and influence" between legislators and the public, *see* App. 67a n.3 (¶ 36 n.3), violates constitutional obligations. App. 20a-21a, 27a-28a (¶¶ 32, 43). That decision contributed to an ongoing split recognized by the court of appeals. App. 27a (¶ 43). While numerous courts have broadly held that legislative process is constitutionally sufficient in zoning decisions, even when the zoning decision affects only one or a small number of property owners, Pet. 11-13, 15-17, other courts have concluded, like the court below, that enhanced or quasi-judicial process in which there are no "*ex parte* contacts" is required. Pet. 13-14. Attempting to obfuscate this important and divisive federal legal question, ACP raises a series of arguments, all of which miss the mark.

1. ACP first asserts that the decision below turned not on a disputed question of federal law, but on quirks of New Mexico state law, including New Mexico's recognition of a property interest in continued zoning rights. BIO 16-17, 24-25. ACP fundamentally misunderstands this Court's procedural due process jurisprudence. To be sure, whether a cognizable property interest exists is, in part, a matter of state law. *See Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 570-71 (1972). The City accordingly does not seek review of the State court's decision in that regard. However, what process is

due under the Due Process Clause of the U.S. Constitution is undeniably a question of federal constitutional law. *See, e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59 (1999).

ACP's related contention that differences in state law distinguish this case from the numerous cases cited in the City's Petition, BIO 19-23, is likewise incorrect. Indeed, the court of appeals itself expressly recognized that "other courts have concluded that minimal process is due under the Constitution in zoning cases," but it "[n]evertheless" chose to reach a different result. App. 27a (¶ 43) (citing *River Park, Inc.* v. *City of Highland Park*, 23 F.3d 164 (7th Cir. 1994)).

ACP now argues that the court of appeals "distinguished" the decisions of these "other courts," including *River Park*, based on the existence of a property interest under New Mexico state law. BIO 20. But the court of appeals did no such thing, *see* App. 27a (¶ 43), and no distinction exists. The Seventh Circuit in *River Park* expressly recognized that "River Park was entitled to due process of law" with regard to the zoning of its property (in other words, that River Park had a cognizable property interest), but nonetheless held that "the procedures 'due' in zoning cases are minimal," and satisfied by legislative action. 23 F.3d at 166.

The Seventh Circuit reiterated the point in *Club Misty, Inc.* v. *Laski*, 208 F.3d 615 (7th Cir. 2000). Although ACP claims that *Club Misty* supports its view that state law controls the inquiry as to what process is due, *see* BIO 20, that case actually makes clear that when the property interest in question is an interest in continued zoning, the process due is no more than the legislative process. 208 F.3d at 622

("zoning is on the legislative side of the legislative/judicial divide"). These cases directly contradict the holding below.

ACP's purported distinctions of the other cases cited in the City's Petition, *see* BIO 19-22, are similarly invalid. First, ACP wrongly asserts that the decision of the Fifth Circuit in *Jackson Court Condominiums, Inc.* v. *City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989), rested on a finding under state law that there was "no constitutionally protected property interest at issue." BIO 20. That court instead stated that it "need not and [did] not address" the existence of a property interest because the legislative nature of the zoning proceeding foreclosed the plaintiff's procedural due process claim. 874 F.2d at 1074. ACP's assertion that the First Circuit's decision in *O'Neill* v. *Town of Nantucket*, 711 F.2d 469 (1st Cir. 1983), resulted from *state* procedural due process requirements, BIO 20, is also wrong: the court held that when normal legislative process had been provided by a zoning authority, "the parties who have been adversely affected have had all and perhaps more than all the procedural due process guaranteed to them *by the Fourteenth Amendment*." 711 F.2d at 472. The rulings of the other federal appellate cases cited in the petition for their approval of zoning changes made through ordinary legislative process were likewise not—as ACP argues, BIO 20-21, 23-24 (citing cases)—dependent on state law. Finally, ACP's attempt to distinguish *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), on the ground that that decision "rests ... on a 'binding interpretation of state law' that upzoning was legislative in nature," BIO 22, fails for the same reason. Whatever form of process is provided under

state law must be measured against federal constitutional constraints.

Additionally, ACP's blanket assertion that state court cases addressing zoning are "irrelevant here because they rest on different state laws," BIO 21-22, is equally baseless. In the cases cited in the Petition, contrary to ACP's claims, the state courts established that they were addressing what process is due under *federal* law. *See McPherson Landfill, Inc.* v. *Board of County Comm'rs*, 49 P.3d 522, 531 (Kan. 2002) (claim at issue was that "the decision of the Board is void based upon a violation of MLI's due process rights under the United States Constitution"); *Arnel Dev. Co.* v. *City of Cosa Mesa*, 620 P.2d 565, 571 (Cal. 1980) (expressly holding that rezoning by "legislative act, thus permitting its enactment by initiative, does not violate the federal Constitution"); *Emmett McLouglin Realty, Inc.* v. *Pima County*, 132 P.3d 290, 294 (Ariz. Ct. App. 2006) (addressing "due process afforded by the United States and Arizona Constitutions"); *Eacret* v. *Bonner County*, 86 P.3d 494, 498 (Idaho 2004) (stating, *e.g.*, that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal," and citing decisions of this Court and the Ninth Circuit); *Hume* v. *Franklin County Fiscal Court*, 276 S.W.3d 748, 752 (Ky. 2008) (relying, in review of "procedural due process" claim, on *Mathews* v. *Eldridge* analysis set forth in prior Kentucky Supreme Court decision).

While ACP asserts that the City seeks to "Federaliz[e] zoning law and procedures to impose 'national uniformity,'" BIO 16, the contrary is true. It is the decision below that improperly federalizes zoning law; the holding under review is that the federal Constitution requires local governments to provide quasi-judicial process.

2. ACP also contends that this case does not involve ordinary legislative process and thus does not permit the Court to review whether such process satisfies the Fourteenth Amendment. BIO 2-3, 24-25. ACP misconstrues the State Supreme Court's ruling. The State Supreme Court found that the process provided here amounted to "normal legislative functioning." App. 67a n.3 (¶ 36 n.3). In reviewing the so-called "*ex parte*" contacts between a City Councilor and citizen that took place when the City Council was enacting the 1995 Uptown Sector Plan ("1995USP"), the court concluded that "[s]uch contacts and influence are common and appropriate in the *normal legislative functioning* of a city council." *Id.* (emphasis added).

ACP nonetheless asserts that the process provided by the City Council was not ordinary legislative action because only a small number of property parcels were affected by the zoning change. BIO 2, 24. But this argument conflates the *process* provided by the City with the *outcome* of the process. Here, the City provided ordinary legislative process, in which legislators voted on a zoning change that had prospective effect, even though the scope of the legislation was narrow. The State Supreme Court held that the narrow scope meant that quasi-judicial process was required. *See* App. 64a (¶ 33) ("when a zoning authority initiates a proposal to downzone a particular property, the zoning authority must afford enhanced procedural protections" and "must act like a judicial body"); *see also* App. 69a (¶ 39) (concluding that "action is quasi-judicial, not legislative"); App. 64a-65a, 71a-72a, 76a (¶¶ 34, 43, 52). But the court did not hold that the process actually provided was anything but legislative in nature.

3. Finally, ACP argues that "[t]he City does not challenge the Court of Appeals' analysis under *Mathews* [v. *Eldridge*, 424 U.S. 319 (1976)]." BIO 23. That argument is correct, but beside the point. The City's position is that no *Mathews* analysis was necessary because, as both State and federal courts have held, zoning changes satisfy federal due process requirements if they are undertaken by legislative process. Pet. 11-13, 15-17. The court of appeals' finding that ACP was further entitled to a tribunal that had no "actual ex parte contact," App. 20a (¶ 32), directly conflicts with these holdings.

## III. THIS COURT SHOULD RESOLVE THE SPLIT AS TO WHETHER A PROPERTY OWNER IS ENTITLED TO § 1983 DAMAGES WITHOUT FIRST PURSUING STATE LAW REMEDIES FOR A DUE PROCESS VIOLATION IN ZONING CASES.

1. ACP further obfuscates the question before this Court by conflating the requirement that a property owner seek state law remedies before filing a § 1983 action with prudential "ripeness" and "exhaustion" doctrines. BIO 27-29. The pursuit of state law remedies does not merely aid interests in finality and reviewability, as ACP suggests. To the contrary, it is a necessary element of the claim of a due process violation. A "constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete *unless and until the State fails to provide due process.*" *See Zinermon* v. *Burch*, 494 U.S. 113, 126 (1990) (emphasis added).

The process due in zoning cases is minimal and satisfied by post-deprivation proceedings because, as this Court made clear in *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Constitution grants to

the states the broad authority to take property for public use without providing prior or even contemporaneous compensation. *Id.* at 194. Drawing on this principle, the Eighth Circuit explained that a failure to provide pre-deprivation process in a zoning case "does not offend the federal Constitution, ... because 'a sovereign vested with the power of eminent domain may exercise that power consistent with the constitution without providing prior notice, hearing or compensation so long as there exists an adequate [postdeprivation] mechanism for obtaining compensation.'" *Cormack* v. *Settle-Beshears*, 474 F.3d 528, 531-32 (8th Cir. 2007) (alteration in original). If a § 1983 claimant cannot show that a state "lacks an adequate postdeprivation mechanism to provide him with just compensation for the alleged taking, his due process claim must fail." *Id.* at 532. *See also River Park*, 23 F.3d at 167.

Because the Constitution requires that a local government provide no more than *post-deprivation* process when regulating land use, there can be no failure to provide all the process that is due until the local government has been given the opportunity to provide such process. The City had no such opportunity here. And, if a local government's procedural error in implementing a zoning change exposes the government to millions of dollars in liability without any opportunity to remedy the error, then local governments—admittedly fallible institutions—will experience a dramatic chilling effect in the regulation of land use.

2. Finally, ACP asserts that these principles do not apply here, because ACP purportedly did seek certain relief in the state courts. BIO 30-32. Although ACP suggests the existence of a material factual dispute on this question, BIO 31, that is

incorrect. Of controlling significance is that once the State courts concluded that the process provided by the City was constitutionally inadequate, the courts permitted the City *no opportunity* to consider the 1995USP using the purportedly required quasi-judicial process. The court should have remanded but did not.

ACP's recitation of the factual record is highly misleading. ACP states that the reason the district court did not remand the zoning decision to the City is that the court found "*on the merits*, that the City failed to prove downzoning criteria" under state law. BIO 31. But the City did not attempt and fail to "prove downzoning criteria" as ACP suggests. Rather, the City argued that it was not required to meet those criteria—which apply only when there is a quasi-judicial review of a downzoning—because the City had properly enacted the 1995USP by legislative process. App. 67a (¶ 37). Once the State court ruled that a quasi-judicial process was required, the court should have allowed the City to conduct that process.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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# In The Supreme Court of the United States

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,

*Petitioner,*

v.

ALBUQUERQUE COMMONS PARTNERSHIP,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico**

## BRIEF FOR *AMICI CURIAE* NEW MEXICO MUNICIPAL LEAGUE AND INTERNATIONAL MUNICIPAL LAWYERS ASSOC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS


| | | Page |
|---|---|---|
| TABLE OF AUTHORITIES | | ii |
| IDENTITY OF *AMICI CURIAE* | | 1 |
| I. | RELEVANT FACTS | 2 |
| II. | THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER FINALITY IS A REQUIREMENT FOR A PROCEDURAL DUE PROCESS CLAIM IN A ROUTINE LAND REGULATION CASE | 4 |
| III. | THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH CONSISTENT REQUIREMENTS FOR PROCEDURAL DUE PROCESS IN LAND REGULATION CASES | 10 |
| IV. | CONCLUSION | 15 |

## TABLE OF AUTHORITIES

Page

CASES

*Albuquerque Commons Partnership v. City Council*, 149 P.3d 67 (N.M. Ct. App. 2006).....8

*Albuquerque Commons Partnership v. City Council*, 184 P.3d 411 (N.M. 2008) .....8

*Albuquerque Commons Partnership v. City Council*, 212 P.3d 1122 (N.M. Ct. App. 2009).....10

*Bd. of Regents v. Roth*, 408 U.S. 564 (1972) .....10

*Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154 (6th Cir. 1992) .....5, 6

*Chesterfield Dev. Corp. v. Chesterfield*, 963 F.2d 1102 (8th Cir. 1992).....6

*City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) .....8, 11

*Cormack v. Settle-Beshears*, 474 F.3d 528 (8th Cir. 2007).....6, 7

*Dent v. West Virginia*, 129 U.S. 114 (1889).....10

*Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83 (2nd Cir. 2002).....5

*Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976).....11

*Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990) .....10

*Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990).....5

*Landmark Land Co. of Okla. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) .....5

TABLE OF AUTHORITIES – Continued

Page

*Littlefield v. Afton*, 785 F.2d 596 (8th Cir. 1986) .....6, 7

*McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).....5

*Olim v. Wakinekona*, 461 U.S. 238 (1983) .....11

*River Park v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994) .....4, 11, 13

*Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3rd Cir. 1993) .....5

*Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002) .....10

*Wax 'n Works v. City of St. Paul*, 213 F.3d 1016 (8th Cir. 2000) .....6, 7

*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) .....4, 5, 9

*Wolff v. McDonnell*, 418 U.S. 539 (1974).....10

*Zinermon v. Burch*, 494 U.S. 113 (1990).....5

CONSTITUTION

U.S. Const. amend. XIV .....9, 10

STATUTES

42 U.S.C. § 1983 .....*passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Edward H. Ziegler, Jr., et al., 4 *Rathkopf's The Law of Zoning and Planning* § 66:28 (4th ed. 2002) ..... 12

N.M. Stat. Ann. § 39-3-1.1 (2009) ..... 8

Supreme Court Rule 37.6 ..... 1

## IDENTITY OF *AMICI CURIAE*

The International Municipal Lawyers Association and the New Mexico Municipal League (collectively, the "*amici*") file this brief in support of the Petition for certiorari filed by the City of Albuquerque.[1] The *amici* are organizations representing local government officials throughout the United States and New Mexico.

The International Municipal Lawyers Association ("IMLA"), previously known as the National Institute for Municipal Law Officers, is a non-profit, professional organization of over 3000 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and through advocacy by providing the collective viewpoint of local governments around the country on legal issues

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party currently representing Petitioner City of Albuquerque authored this brief in whole or in part, and no party or Counsel made a monetary contribution. At the behest of the *amici* only, Counsel for Petitioner in the initial proceedings in the New Mexico Court of Appeals and the New Mexico Supreme Court did advise Counsel of Record in preparation of this Amicus Brief. All counsel of record received timely notice of the intent to file the brief, and granted consent to the filing hereof.

before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The New Mexico Municipal League ("NMML") is a non-profit, nonpartisan corporation whose members are the incorporated municipalities of the State of New Mexico. All 102 New Mexico incorporated municipalities are members of the New Mexico Municipal League. League staff and officers frequently appear before state agencies and legislative committees to testify on rules, regulations, and proposed legislation affecting municipalities in New Mexico.

This case is of particular interest to IMLA and the NMML because of its far reaching consequences. As a result of this decision, local governments in New Mexico face inequitable penalties in reviewing and acting on ordinary land use matters, as compared to local governments in other states, based on an erroneous construction of the Fourteenth Amendment that has given rise to a deep split in court decisions. Unless this division is checked, local governments throughout the country will increasingly be hamstrung as they engage in the type of planning and legislation necessary to create harmonious, civil, and livable communities for the present and future.

## I. RELEVANT FACTS

The *amici* refer to the statement of the case, factual background, and proceedings below set forth

in the Petition for a Writ of Certiorari filed by the Petitioner, the City Council of the City of Albuquerque, New Mexico, November 5, 2009, at 2 through 11, together with the appendices to the Petition. The *amici* wish to emphasize certain facts that are particularly relevant to this brief.

The property that was owned by Respondent, Albuquerque Commons Partnership, ("ACP") was originally within the City's 1981 uptown sector plan ("1981 USP"). Pet. App. 47a (¶4). In 1991, ACP's contract purchaser submitted a proposal to the City to build a "big box" retail project on the property; but ACP's contract purchaser withdrew that proposal. Pet. App. 48a (¶9). A second proposal was submitted later. Pet. App. 48a (¶6).

During the pendency of ACP's contract purchaser's proposal, the City reviewed a proposal to modify the 1981 USP with an intent to create a "true urban center for the City." Pet. App. 89a-90a (¶15). In 1995, the City Council unanimously approved the amendments to the USP. Pet. App. 93a (¶24).

ACP's contract purchaser's plan did not comply with the new requirements, but did comply with the older requirements. Pet. App. 52a (¶14); Pet. App. 70a-71a (¶41-42). Disappointed by the change in zoning, ACP elected to sue the City for damages under 42 U.S.C. § 1983 by attacking the City's procedures rather than to ask the New Mexico courts to require the City to provide the additional process

ACP claimed it deserved under state zoning law. Pet. App. 52a (¶15).

## II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER FINALITY IS A REQUIREMENT FOR A PROCEDURAL DUE PROCESS CLAIM IN A ROUTINE LAND REGULATION CASE.

As identified in the Petition for a Writ of Certiorari, the Circuit Courts of Appeals are divided about the extent to which a property owner must obtain final resolution of available state law remedies before asserting a claim under 42 U.S.C. § 1983 for a procedural due process violation arising out of a land use decision. More specifically, the Circuit Courts of Appeal disagree as to whether the reasoning of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) should apply to a claim of denial of procedural due process.

Some of the Circuit Courts of Appeals apply *Williamson County* to procedural due process claims under 42 U.S.C. § 1983. For example, the Seventh Circuit has held that "labels do not matter" and that regardless of whether a property owner is asserting a takings claim, a substantive due process claim, or a procedural due process claim, "[a] person contending that state or local regulation of the use of land has gone overboard must repair to state court." *River Park v. City of Highland Park*, 23 F.3d 164, 167 (7th

Cir. 1994). Similarly, a person seeking expansive due process rights in a zoning case should look to state land use procedures. See also *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88-89 (2nd Cir. 2002) (applying the ripeness requirements of *Williamson County* to procedural due process claims); *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc) ("By contrast, a procedural due process violation is not complete 'unless and until the State fails to provide due process.'") (quoting *Zinermon v. Burch*, 494 U.S. 113, 126 (1990)); *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1294 (3rd Cir. 1993) (applying *Williamson County's* finality requirement to a procedural due process claim). The Tenth Circuit, on the other hand, found the application of *Williamson County* to a procedural due process claim to be "incorrect" in a case involving takings and substantive due process claims to which *Williamson County* was applied, reasoning that the plaintiff could have a property interest in "specific permits." *Landmark Land Co. of Okla. v. Buchanan*, 874 F.2d 717, 719, 722, 723-724 (10th Cir. 1989), *abrogated on other grounds in Federal Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999).

Two Circuit Courts of Appeals, meanwhile, have held that the *Williamson County* ripeness requirements may apply to procedural due process claims "depending on the circumstances of the case." *Harris v. County of Riverside*, 904 F.2d 497, 500 (9th Cir. 1990); see also *Bigelow v. Michigan Dep't of Natural*

*Res.*, 970 F.2d 154, 159-160 (6th Cir. 1992) (discussing how the facts of the case may affect the ripeness of a procedural due process claim). In the Sixth Circuit, the most important "circumstance of the case" appears to be whether it "present[s] a pure claim of procedural due process, [or] instead involves several constitutional claims." *Id.* at 159. Supporting this distinction, the court noted that in the case before it "addressing the plaintiffs' procedural due process claim at this stage of the proceedings would allow future plaintiffs effectively to circumvent the ripeness requirement for takings claims simply by attaching a procedural due process claim to their complaint." *Id.* at 160.

The Eighth Circuit, meanwhile, appears to have its own unresolved internal conflict. In one case, the Eighth Circuit has held that plaintiffs must demonstrate the lack of an "adequate postdeprivation mechanism" under state law in order to assert a violation of the Due Process Clause. *Cormack v. Settle-Beshears*, 474 F.3d 528, 532 (8th Cir. 2007); see also *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000). In an earlier case, however, the Eighth Circuit expressly rejected a municipality's argument that a procedural due process claim was barred because "state remedies [were] available," determining that the proper inquiry was not whether state remedies were available but rather whether the plaintiff had "a right to a *pre*deprivation hearing." *Littlefield v. Afton*, 785 F.2d 596, 599, 600 (8th Cir. 1986), *overruled on other grounds*, see *Chesterfield Dev. Corp. v. Chesterfield*, 963 F.2d 1102, 1104 n.2

(8th Cir. 1992) (emphasis added). It is difficult to reconcile *Cormack*, which seems to categorically bar procedural due process claims where post-deprivation state law remedies are available, with *Littlefield*, which would seem to ignore any post-deprivation state law remedies upon a finding that a pre-deprivation hearing was required. The Eighth Circuit did not discuss or overrule *Littlefield* in *Cormack* or *Wax 'n Works*.

The existence of opposing interpretations on whether all state law remedies must be pursued, and finality achieved, to ripen due process claims under 42 U.S.C. § 1983 exposes municipalities in different parts of the country to widely divergent potential liabilities. While some municipalities may confidently exercise their delegated authority to regulate land use within their jurisdictions with knowledge that technical mistakes in procedure may be remedied by subsequent proceedings, other municipalities are burdened by the risk that mistaken interpretations of what procedures are required may give rise to a claim against the municipalities for crushing damages and attorneys fees.

Indeed, an aggressive applicant may view a procedural due process claim, or multiple claims, as a way to recoup operating expenses and opportunity costs even while an application is pending. Every decision of the municipality – to schedule a hearing on a particular day, to table a decision to the next meeting – becomes fodder for a procedural due process claim. While state law may provide for remedies for such actions, the federal Constitution

does not. As Justice Scalia said in his concurrence in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 200 (2003), "[f]reedom from delay in receiving a building permit is not among [those] fundamental liberty interests" protected by substantive due process. Nor should it be protected by more than minimal procedural due process.

The facts of this case amply demonstrate the need for finality as a prerequisite to a procedural due process claim. In the initial administrative appeal from the City's decision, the New Mexico District Court concluded that the City's actions had not complied with New Mexico requirements for the type of action involved, namely that a quasi-judicial hearing should have been held rather than the legislative process which the City used. Pet. App. 52a (¶15). The New Mexico Court of Appeals reversed this decision in *Albuquerque Commons Partnership v. City Council*, 149 P.3d 67 (N.M. Ct. App. 2006); and the New Mexico Supreme Court reversed it again. See *Albuquerque Commons Partnership v. City Council*, 184 P.3d 411 (N.M. 2008). However, the New Mexico courts did not grant the appropriate remedy available to them under New Mexico law: remanding the matter to the City Council to conduct the appropriate type of hearing and render a new decision. N.M. Stat. Ann. § 39-3-1.1 (2009). Rather, ACP was permitted to proceed to a jury verdict on its claim for damages under 42 U.S.C. § 1983 for a denial of procedural due process. Pet. App. 53a (¶15, 18).

Instead of providing the City Council with the opportunity to fix what the District Court had determined was an error, the subsequent proceedings resulted in monetary damages exceeding $8 million. The landowner was permitted to use 42 U.S.C. § 1983 to ambush a local government faced with a particularly knotty question about whether existing land use regulations created vested property rights under state law, a question which required resolution by the New Mexico Supreme Court. The Fourteenth Amendment surely does not act in such a ruthless manner as to allow for such a punitive result.

The *amici* represent municipalities ranging from the largest cities, with full time legislative bodies and decision-makers, professional staff and full time counsel, down to the smallest towns, which rely on volunteer citizens working long into the night to render fair decisions on zoning matters. While the Fourteenth Amendment identically applies to all municipalities, the split on this issue creates an inequity that could engender widely divergent approaches to procedures for the zoning process at the local level. One of the important aspects of the finality requirement that this Court enunciated in *Williamson County* is to provide an opportunity for municipalities to fix mistakes, to ensure that the procedural protections of the Fourteenth Amendment are observed.

Thus the *amici* support national uniformity on this issue, and urge this Court to grant *certiorari*.

## III. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH CONSISTENT REQUIREMENTS FOR PROCEDURAL DUE PROCESS IN LAND REGULATION CASES.

The Fourteenth Amendment protects "the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)). When property interests are at stake, an appellate court reviewing a procedural due process claim addresses the issue in two steps. The first step is to ask whether a property right exists, created by an independent source of state law. *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4th Cir. 2002) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The New Mexico Court of Appeals determined that ACP had a vested property interest in the form of "a right, under state law, to continued zoning in the face of downzoning or a map amendment unless the City was able to justify a zoning change . . . " under the requirements of state law and City ordinance. *Albuquerque Commons Partnership v. City Council*, 212 P.3d 1122, 1127 (N.M. Ct. App. 2009).

The second step is to determine whether a violation has occurred by "consult[ing] the entire panoply of predeprivation and postdeprivation process provided by the state." *Tri-County Paving, Inc.*, 281 F.3d at 436 (citing *Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990)).

This Court has held that the procedures due in a zoning case are minimal; municipalities may even make zoning decisions through the political process by putting the question to a popular referendum without violating the Fourteenth Amendment. See *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976); see also *River Park v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994). As noted by the Seventh Circuit in *River Park*, the fact that the substantive protection afforded private property under the Constitution is itself so limited explains the "reason why such scant process is all that is 'due' in zoning cases"; minimal process is sufficient because "[s]tate and local governments may regulate and even take property; they must pay for what they take but are free to use the land as they please." *Id.* at 167. See also *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 201 (2003) (Scalia, J., concurring) ("There is nothing procedurally defective about conditioning the right to build low-income housing on the outcome of a popular referendum").

"[T]he idea in zoning cases is that the due process clause permits municipalities to use political methods to decide, so that the only procedural rules at stake are those that local law provides. . . ." *River Park*, 23 F.3d at 167. The Constitution does not even require state and local governments to adhere to their procedural promises. *Olim v. Wakinekona*, 461 U.S. 238, 248–51 (1983).

Given that under this case law, the Fourteenth Amendment permits the City of Albuquerque to

amend the 1981 USP as a fully legislative matter without violating the procedural due process rights of ACP, it is immaterial whether the hearings held by the City Council allowed *ex parte* communications such that the hearings did not, in the eyes of the New Mexico Court of Appeals, constitute a "fair" tribunal. The legislative process is frequently "unfair" in its very nature as an expression of the popular will.

Further, there is a strong judicial interest in limiting the use of procedural due process to enforce state procedures in federal court through the vehicle of 42 U.S.C. § 1983.

> Apparently underlying the rationale of the lower federal courts is a concern that they not be overwhelmed by Section 1983 cases where the case is too typical of the "run of the mill" dispute between a landowner and a municipality, of the sort that involves permit and similar denials. These cases are consistent with Supreme Court cases holding that not every state tort gives rise to a "constitutional" tort actionable under Section 1983. A similar rationale has been used in other cases to refuse Section 1983 cases based on an estoppel claim and a claim that plaintiff was harassed by the enforcement of a nondiscriminatory ordinance.

Edward H. Ziegler, Jr., et al., 4 *Rathkopf's The Law of Zoning and Planning* § 66:28 (4th ed. 2002) (footnotes omitted). While ACP brought its federal claim in state court, the multimillion dollar verdict

ACP secured will inevitably encourage future developers to take their local battles to federal court.[2]

Against this backdrop, the *amici* are concerned about the divergence of state and federal decisions imposing various additional procedural requirements on land use decision-making. Not only may these inconsistent views reflect purely local perspectives on land use regulation, they ultimately lead to the argument that the failure to adhere to procedures based on state zoning law distinctions violates the Fourteenth Amendment's guarantees of procedural due process.

As this case demonstrates, technical nuances of a state's zoning law may find expression in a state court's heightened concern for procedural protections that go beyond anything the Constitution requires.

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[2] Judge Easterbrook's opinion in *River Park* reflects the frustration that federal courts face when a property owner tries to transform a local land use dispute into a matter of constitutional significance.

> Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit, but state courts often afford relief on facts that do not support a federal claim. Is it that they have omitted the steps necessary to obtain review in state court and hope for the best in a second-chance forum? Well, we are not cooperating. Litigants who neglect or disdain their state remedies are out of court, period.

*River Park, supra*, 23 F.3d at 165.

While New Mexico should be free to inject a procedural element into state law principles that determine when a zoning classification creates a property right, for purposes of the Due Process Clause, a change affecting the permissible use of land in New Mexico should have no greater constitutional significance than does a comparable zoning change in Illinois.

The *amici* support national uniformity on this issue, because municipalities, large and small, be they western, southern, eastern, or northern, need a principled and consistent understanding of the steps required to ensure compliance with the Due Process Clause. Furthermore, this lack of uniformity hinders multi-jurisdictional efforts to study and promote standard best practices for land use procedures that strike the right balance between efficiency and fairness.

## IV. CONCLUSION

For the foregoing reasons, the *amici* urge this Court to grant the Petition.

Respectfully submitted,

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